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SUPERFUND LAWS AND ANIMAL AGRICULTURE

HEARING

BEFORE THE

SUBCOMMITTEE ON
SUBCOMMITTEE ON ENVIRONMENT AND
HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 16, 2005

Serial No. 109–72

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SUPERFUND LAWS AND ANIMAL AGRICULTURE

WEDNESDAY, NOVEMBER 16, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENVIRONMENT
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:13 p.m., at 2322 Rayburn House Office Building, Hon. Paul Gillmor (chairman) presiding.

Members present: Representatives Gillmor, Hall, Deal, Wilson, Bass, Otter, Sullivan, Murphy, Barton (ex officio), Solis, Pallone, Stupak, Inslee, Baldwin, and Dingell (ex officio).

Also present: Representative Osborne.

Staff present: Tom Hassenboehler, majority counsel; Jerry Couri, policy coordinator; Peter Kielty, legislative clerk; Dick Frandsen, minority senior counsel; and Lorie Schmidt, minority counsel.

Mr. GILLMOR. The Committee will come to order. And, first, I would like to apologize for starting the committee late, which I hate to do, but I am also on the Financial Services Committee and we are dealing with a regulatory relief bill, a mark-up, today, and they had an amendment in which I was involved. And so we had to dispose of that first and that is done, so we should be okay. I would like to request unanimous consent for Congressman Tom Osborne, who is not a member of the committee, to sit on the dais for this hearing to observe. Is there objection? Chair hearing none, it is awarded.

In his first message to Congress on December 8, 1801, the noted farmer, philosopher, and American statesman, and was President Thomas Jefferson, called agriculture one of the four pillars of our prosperity. And today's hearing goes to the heart of Jefferson's comments. We are focusing on an issue that is increasingly drawing farmers out of their barns and fields and into courtrooms based on a new theory of liability, of obligation, and recovery under Superfund, and the Superfund Amendments and Reauthorization Act of 1986. Specifically, the notion is whether the manure and flatulence of their livestock constitute Superfund-caliber pollutants or contaminants, and whether their production is legally defined release under the Law. And on top of that, if it is, should the U.S. Government be using Superfund Law to monitor this activity on farms. As I understand it, some of these questions are currently being litigated in our courts in Oklahoma and in Texas, and, in fact, there has been a slight up-check in the number of notices announcing the intent to sue livestock manufacturers under this theory of recovery.

Now, I grew up in rural Ohio and I grew up around farms, and I certainly have the greatest respect for the hours and hard work that America's farmers put in, In fact, many of my family has been involved in farming, and some of my cousins are still actively engaged in farming. I think people sometimes forget that milk and beef do not just appear at the grocery store or the corner restaurant, and they sometimes forget that it has to come from a farmer somewhere. And U.S. producers are the envy of the world with the way that they ensure the safest, the least costly, and the most abundant food supply in the world.

But I also know that production agriculture is no longer just a world of small family farms of times gone by. Consumer demands, market pressures, have forced major consolidations in agriculture, including the creation of many very large farms—in fact, in some areas, becoming more the norm than the exception. Which brings me to the focus and the point of this hearing: do livestock farms become Superfund sites by virtue of the biological processes of their animals, and are these processes already adequately regulated.

Now, I think there are some people who may want to have this hearing veer off in certain areas—other areas, but I want to make it clear, even though we may be talking about chickens, this hearing has absolutely, flatly nothing to do with avian flu or any other kinds of disease. This is an environmental and emissions hearing. But I do want people to consider another point: if you support using organic farming practices instead of the ones that are driven by chemicals—which, in fact, are currently exempt from Superfund liability, would you want the same Superfund reporting and liability issues to attach themselves to manure in our organic farm fields in the same way that they are now causing problems for some livestock producers around the country? And while I am certainly willing to see some help extended to farmers for manure, I don't believe that the industry should automatically get a blanket pass from Superfund. The Law is so focused on contaminants and their levels of concentration, not on industries, and no agricultural producers who has activities levels equal to or greater than a large industrial facility should be given an exemption simply by virtue of the identity of the work.

Now, I also want to thank our witnesses on this panel and the next panel for being here today. Particularly, I want to thank, on the next panel, my constituent Leon Weaver from Williams County for being here and giving us his wisdom on this issue. Also, I want to mention that the subcommittee is acutely aware of interest by farm groups and environmental issues that are, in fact, under the jurisdiction of the House Energy and Commerce Committee, and we hope the farm groups will not be reluctant to engage our Committee in considering legislative action on this items, and with the reauthorization of the Farm Bill in the offing, we especially hope that we can have a collaborative rather than a confrontational position fostered as we move forward.

And now I yield 5 minutes to the gentlelady from California, Ranking Member Solis.

Ms. SOLIS. Mr. Chairman, if I could, I would like to recognize our ranking member on the Energy and Commerce Committee, and that is Congressman Dingell.

Mr. DINGELL. Mr. Chairman, the gentlewoman is most gracious. I will wait my turn. Thank you.

Ms. SOLIS. Thank you. Thank you, Mr. Chairman, and good afternoon to the witnesses and to those in attendance. I appreciate this hearing being held today on the Superfund Laws and Animal Agriculture. I want to also thank those witnesses that have come far to testify today.

As a result of recent lawsuits, we are having this hearing to discuss environmental and public health impacts of proposals that would change our Superfund laws as they apply to the agricultural industry. Over the years, the livestock and agriculture industry has changed dramatically. Large livestock farms have steadily been replacing smaller family run farms. CAFOs are large super-sized factory farms that raise livestock, cattle, hogs or chickens in large numbers, in up to hundreds of thousands, often in crowded warehouses and like spaces. Because of patchwork regulation over these facilities, it is uncertain how many actually exist in my State of California. However, we do know that there are about 1.3 million cows.

California is the No. 1 milk producer of the Nation, producing 1 of every 5 gallons of milk consumed in the United States. California's Center Valley is home to approximately 1,600 of the State's 2,400 dairies. Its 891,000 cows create as much waste as 21 million people, over 60 percent of California's population. And as a result, California's Central Valley is suffering severe surface and groundwater pollution from dairies. Pollution in the Central Valley affects much of the rest of the State because its rivers provide drinking water for cities nearby and as far south as Los Angeles. More than 10,000 square miles of aquifers in California are polluted with nitrates, and cow waste is a major source of pollution.

While the production of animal waste is natural, manure and other components of animal waste can pose substantial risk to the health and safety of the American public and the environment. Industrial farms, as we know, generate 500 million gallons of manure waste each year. This is three times the amount of waste the human population of the U.S. Nitrogen and phosphorous are the primary pollutants associated with animal waste. There are over 150 pathogens in livestock manure, including E. coli and salmonella, which can result in infections of the skin, ears, eyes, nose, and throat. We know animal waste submits toxic odors, gasses such as sulfide and ammonia, and animal waste contaminates surface water and groundwater. 29 States have linked ground water contamination to CAFOs.

Pollutants in animal waste also affect human beings. A variety of health problems faced by neighbors of huge industrial farms have been linked to the vast amounts of concentrated animal waste. People living near factory farms say their sickness rolls in the wind. Odor and gasses from factory farms are making people sick and destroying property values. It brings headaches that do not go away, and trips to the emergency room for children whose lungs suddenly close up. Large poultry industry farms have been linked with the spread of the bird flu. The bird flu in Indonesia originated in large commercial poultry farms. This is something we need to monitor in factory farms in this country.

And in North Carolina, recent studies have found that hog farms in recent years that are concentrated in the eastern North Carolina, a relatively poor region of the State with a large rural African American population. This has led to a growing concern that the environmental health impacts of factory farms are disproportionately borne by poor, low-income, and minority communities.

For these reasons, I am very concerned about the efforts to exempt CAFOs from the Superfund and the Emergency Planning and the Community Right-to-Know Act. Under Superfund and the Community Right-to-Know Act, livestock operations are required to notify Federal, state, and local agencies of releases of 100 pounds per day of ammonia and hydrogen-sulfide. Ammonia and hydrogen-sulfide are two toxic substances routinely released by large livestock operations. This reporting requirement provides local, state, and Federal agencies with critical information about potentially dangerous releases that affect our communities.

States who respond to the release of hazardous substances have a mechanism under Superfund to recover their response costs. Attempts to exempt livestock operators from CERCLA and EPCRA will undermine current legal authority to protect our communities. I urge my colleagues not to weaken and waive, or roll back, Federal public health and environmental protections. And I look forward to hearing from our witnesses today. Yield back the balance.

Mr. GILLMOR. Gentlelady yields back. The gentleman from Texas, Mr. Hall.

Mr. HALL. Mr. Chairman, I also thank you for holding the hearing on this very important issue. It is an issue that absolutely threatens the United States agricultural industry. It is—agriculture, as all of us know, is an industry that is currently regulated by the Clean Water Act, the Clean Air Act, and State laws. It is important that we not place another unnecessary burden on this group by subjecting them to regulation and reporting requirements under a law that was never, never, ever intended to address their industry.

Today, along with Representative Roy Blunt and numerous other colleagues from both sides of the aisle, we are introducing legislation that would clarify Congressional intent, and what that intent was when we passed Superfund laws. Chairman Dingell and several others were here at that time. I certainly was here when those laws were passed, and we know that this legislation that we are introducing today will define manure and ensures that the agricultural industry will not be subjected to regulation under Superfund laws, namely the Comprehensive Environmental Response Compensation and Liability Act of 1980, and/or the Emergency Planning and Community Right-to-Know Act. It does not change current law, and does not compromise the Clean Air Act and Clean Water Act which regulate agriculture.

It is my hope that in holding a hearing on this issue, we will be able to develop an equitable compromise to protect agriculture. This hearing gives us an opportunity to hear from experts in the industry about the threats to the agricultural industry in this regard, and suggestions for clarification of the intent of the law. It will also give us an opportunity to have the proper entity from Congress protect the people.

Mr. Chairman, I thank you again for scheduling this hearing, and I thank our panelists for being here today, and I thank you very much, sir, Mr. Breen.

Mr. GILLMOR. The gentleman from Michigan, the distinguished ranking member.

Mr. DINGELL. Mr. Chairman, you are most kind. I commend you and I thank you for holding this hearing. Mr. Chairman, there have been efforts recently to circumvent the expertise and jurisdiction of this Committee and of this distinguished subcommittee. And through inserting language in the Agriculture Appropriations Conference Report, which raised the issue of exempting large consecrated animal feed operations, or CAFOs as they are called, from the Superfund statute and the Emergency Planning and Community Right-to-Know Act (EPCRA), it is important that we get the accurate facts before the subcommittee before the Congress about these two statutes and the issues that they present to family farms as opposed to large industrialized CAFOs.

I chaired the Conference Committee in 1986 that authorized the Superfund program and the Superfund amendments and Reauthorization Act of 1986, and I do not recall any discussion or attempt or intent to exempt manure from the definition of hazardous substances or pollutants or contaminants. Nor does the Conference Report discuss a manure exemption from the definition of hazardous substances. I would note that petroleum and natural gas are excluded in the definition of hazardous substances in those statutes. Congress knew how to create exclusions, and it is erroneous to say that the Congress intended to do so for manure. The statute does not include—rather, it does not exclude the normal application of fertilizer from the Superfund definition of release.

There is also legislative history stating the term normal field application means the act of putting fertilizer on crop or cropland and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place, or significantly greater concentrations or amounts than are beneficial to crops. The determination of what is normal appears to be a fact-specific decision based on the circumstances of the application, and I think it is something into which we could well go at this particular time.

Further, there is a defense to liability if the release is federally permitted release, such as permitted release under the Clean Water Act. Congress thus created a number of specific defenses to liability for agricultural operations in the Superfund statute. On a broader level, we can find only three cases where the response authorities of Superfund have attempted to be used with respect to agricultural operations. In two cases, the matters involved city governments—Waco, Texas, and Tulsa, Oklahoma—which brought actions to protect drinking water supplies from phosphorous pollutions related to dairy and poultry operations. The third case is an action by the State of Oklahoma for recovery of costs and natural resource damages in the Illinois River Watershed alleging injury and destruction of fish, wildlife, bio to groundwater and drinking water supplies from improper poultry waste disposal practices. We should also recognize that there is no citizen suit provision to enforce the response authorities' natural resource damages or injunctive relief authorities of the statute. In addition, no civil penalties can be assessed since the core provisions of Superfund are remedial, not regulatory, in statute.

There is, however, one reporting requirement in Section 103 of Superfund, and a similar reporting requirement in EPCRA, for releases of hazardous and extremely hazardous substances above reportable quantities established by EPA. Here, again, we can find only a handful of cases for failure to report releases of ammonia or hydrogen-sulfide above the reportable quantity of 100 pounds a day. I would note that some definition of this might be in order, and we might very well make inquiry into that matter in this particular hearing. I would note that the statute authorizes civil penalties, but no civil penalties were assessed for the Superfund or EPCRA reporting violations in these cases.

I am interested in whether the reportable quantity limits would have a burdensome effect on family farms. What is the size of herd or flock that would likely trigger the reporting requirements for ammonia and hydrogen-sulfide as I mentioned earlier? Is EPA, which has administrative authority to adjust them, considering guidance to family farms to lessen anxieties that may have been created, or is EPA already considering adjustments to the reportable quantity limit? I look forward to hearing from them on this point.

Finally, Mr. Chairman, although you did not want this hearing to explore this issue, this Committee, which has jurisdiction over public health, should examine the impact, if any, of large industrial-sized poultry CAFOs and the proximity of poultry CAFOs to industrial-sized hog farms on the spread of infectious diseases, including avian flu.

Mr. Chairman, I thank you, and I look forward to the testimony of the witnesses.

Mr. GILLMOR. Thank you. The gentlelady from New Mexico, Ms. Wilson.

Ms. WILSON. Thank you, Mr. Chairman. I came early because I was looking forward to a few laughs from Ralph Hall's opening statement, and I was amazed that he was so restrained, my colleague from Texas.

The livestock industry is a very important part of——

Mr. GILLMOR. Do you want him to start again?

Ms. WILSON. The livestock industry is a very important part of New Mexico's economy, and there are nearly 200 dairy farms in New Mexico. Most folks are surprised that New Mexico is such a dairy state. I think we just recently passed Texas as the No. 8 dairy producer in the Nation. Those dairies employ about 3,000 people in our State, and they have—and we have the largest average herd size in the Nation, between 1,600 and 1,700 average size of a herd. And the interesting thing is that not one of them is corporate-owned. They are all owned by families, many of them several generations.

It is about a $1.6 billion industry in New Mexico, and there are about almost 200 concentrated animal feeding operations in my State as well. These cattle operations and dairy farms are already regulated, both federally and by our State. And, in fact, in New Mexico, the State regulation seems to be pretty good. The dairy farmers and the cattlemen from my State are not asking to be exempt from regulation. They are just asking Congress to clarify that a dairy farm is not a Superfund. There is a significant difference, and it wasn't intended to apply to animal agriculture.

I think we also have the potential where, unless we act, we are going to have judges and courts deciding—or trying to decide—what it was that the Congress intended when we passed the Superfund law, and we should just be clear up front, rather than having our dairy farmers and cattle operators fighting in court over what we thought we meant a whole long time ago. So rather than spending—have our folks spend a whole lot of money with litigation costs, we should just clarify this, and continue to regulate these operations under the Clean Water Act, the Clean Air Act, and State laws to protect the environment, not try to deal with the problem by redefining a set of statutes—the Superfund—that really wasn't intended for this purpose.

And I thank the Chairman for holding this hearing today, and I look forward to working with him. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you. The gentleman from New Jersey, Senator Pallone.

Mr. PALLONE. What did you just say? Senator Pallone—oh, please.

Mr. GILLMOR. Mr. Pallone Mr. PALLONE. God, the abuse. That is all right. Thank you, Mr. Chairman. I am glad that you called this hearing so we can publicly discuss an issue that, so far, has been the subject of under-the-radar attempts to undermine critical environmental protections. It is important that we examine how CERCLA and EPCRA may apply to large industrial agricultural operations. I come from a State where we know well the consequences of toxic pollution. New Jersey has the dubious distinction of being home to more Superfund sites than any other State, and my constituents health continues to be threatened by serious contamination.

It is my understanding that many of these mega-farms more closely resemble industrial operations than family farms, and can often create industrial levels of pollution. And that is why I don't take lightly any efforts to change CERCLA or EPCRA, two laws that are critical for protecting our citizens' health. EPCRA ensures that the public has access to information about large releases of toxic chemicals, and it is always disconcerting to hear of attempts to hide this sort of information from the public. CERCLA, for its part established a principle that polluters, not taxpayers, should pay to clean up our Nation's most seriously contaminated sites. In instances where vast quantities of manure have contaminated waterways and caused taxpayers to pay for expensive cleanups, I think there is a legitimate interest to consider pursuing reimbursement from the polluters.

It is also important to point out that CERCLA does not allow for incessant citizen lawsuits or impose undue regulatory burdens on farms. Citizens can only sue to recover cleanup costs, and only if the response action was done in accordance with the EPA's national contingency plan. Injunctive relief is only available to the

President, and natural resource damage suits are only available to State or Federal trustees.

I look forward to hearing from the witnesses further about this issue. But since we have brought up the topic of Superfund, I would like to take this opportunity to suggest to the Chairman that there is another pressing, and related topic, in which I think we should at least hold a hearing. Reports from the EPA Inspector General, and others, have found a serious shortfall in funding for mediation of existing orphaned Superfund sites across the country. Our subcommittee should examine the current funding situation for the program, where the funding shortfalls have slowed down or prevented cleanup of specific sites, and whether Congress needs to reinstate the Superfund taxes to ensure that polluters, not taxpayers, pay for the cost of cleaning up our Nation's worst toxic sites.

And this issue hits close to home for me. A site in my district, Imperial Oil, is currently waiting more than $17 million from the EPA so that remediation work can begin. Given the EPA's inability to adequately fund work at other sites in my district, I am skeptical that Imperial Oil, and many others like it in New Jersey, will be cleaned up in a timely fashion.

Mr. Chairman, I look forward to working with you on this, and other issues before the subcommittee. Thank you.

Mr. GILLMOR. Thank you. And the Chair recognizes the Chairman of the Full Committee, Mr. Barton.

Chairman BARTON. Thank you, Chairman Gillmor, for holding this hearing on the application of Superfund laws to animal, agriculture, and farming operations.

Today, your subcommittee begins the first Congressional look into whether these laws are the proper means for further environmental regulation of the agricultural community, and if so, how they should apply. I know there is a very heartfelt conviction on this issue, and we are going to hear from witnesses with their concerns on both sides of the issue.

I understand that Superfund laws and the reporting have rarely—their reporting have rarely, if ever, been enforced against our farmers and ranchers in this country. I know that I have not thought of the farms and ranches in my Congressional District and in Texas as Superfund sites. Smelly, maybe, but not Superfund sites. That today's agriculture producer faces a different world than the one which existed when the Superfund first became a Federal law. I know that in order to remain competitive, agriculture has begun to consolidate, just like so many other United States industries. Despite these pressures, the work of American farmers and ranchers continues. They produce the food we eat and the clothes we wear. I am not going to endorse anything that erodes the U.S. farm and ranch community ability to provide the safest, most affordable, and most abundant food supply and fiber supply in the world. I want rural America to be more than just a good place to live. I still want it to be a good place to raise a family and make a living.

I also share a concern with many of my colleagues on this Committee about what happens when the courts begin to write public policy instead of the legislature, whether it be at the State level or the Federal level. It is our job, as Congress, to write the law, not a court somewhere. Since this Superfund application issue seems to take so many farmers, or beginning to take so many farmers out of their fields and put them in courtrooms, I think we as a Congress have an obligation to take the issue up. That is why we are here today. If we need to legislate and clarify exactly what a Superfund site is, then we need to get the facts first, and that is why we are here.

If this Committee decides to move forward on legislation, I want to know what the facts are. Recognizing all the places that this Committee's jurisdiction impacts America, and specifically farms and ranches, especially when a new farm bill is on the rise, and I hope that after today's hearing, we can work on a bipartisan basis to decide if legislation is needed, and what that legislation is, and then move forward.

With that, Mr. Chairman, I yield back the balance of my time.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Chairman Gillmor, for holding this hearing on the application of Superfund laws to animal agriculture and farming operations. Today, this subcommittee begins the first congressional look into whether these laws are the proper means for further environmental regulation of the agricultural community, and how they should apply. I know there is very heartfelt conviction on this issue and we will hear from witnesses with their concerns on both sides.

I understand that Superfund laws and the reporting have rarely been enforced against farmers. I know that I've not thought of the farms and ranches in my congressional district as Superfund sites. Smelly maybe, but not Superfund sites.

It is a fact, however, that where I see the cradle of civilization and the producers of America's food and fiber, some just see toxic waste and a reason to sue.

Today's agricultural producer faces a different world than the one which existed when Superfund first became law. I know that in order to remain competitive, agriculture has begun to consolidate, just like so many other U.S. industries. Despite the pressures, the work of American farmers and ranchers continues to produce the food we eat and the clothes we wear. I will not endorse anything that erodes U.S. producers' ability to provide the safest, least costly, and most abundant food supply in the world.

I want rural America to be more than just a good place to live. I want it to be a good place to make a living.

I also share a concern with many of my colleagues on this Committee about what happens when the Courts begin to write public policy. That's our job.

Since this Superfund application issue seems to take so many farmers out of their fields and put them into courtrooms, we have an obligation to take it up. That's why we are here today.

Now, regardless of my own sentiments, I am committed to a fair and open process as our Committee moves forward. Recognizing all the places our jurisdiction impacts farms and rural America, especially with a new farm bill on the horizon, I hope that we can work effectively with the farmers and ranchers s to solve this puzzle.

With that I yield back the balance of my time.

Mr. GILLMOR. I thank the Chairman, and we recognize the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman, for holding today's hearing, and welcome to our witnesses.

I look forward to today's hearing and an open discussion regarding animal feeding operations, or AFOs, as—and whether they should be exempt from certain environmental laws. There are questions that need to be answered, and while I don't expect we will find all the answers today, I think this hearing is important so we can explore any potential environmental and public health risk that AFOs, and in particular CAFOs—the industrial-sized livestock farms—may pose to the workers and the surrounding communities.

Animal feeding operations produce over 500 million tons of manure annually, and introduce substantial amounts of waste into the environment. The waste is associated with several pollutants including pathogens, antibiotics and arsenic, that pose serious public health and environmental risks. These contaminants can be harmful when they find their way into our surface water and groundwater, and also when significant amounts are emitted into the air that we breathe.

I come from the great State of Michigan, and my Congressional District in northern Michigan is surrounded by the Great Lakes on three sides, so clean water is very important to the residents of my State as the Great Lakes are our source of drinking water, recreation, fishing, and through tourism, an integral part of our State's economy.

We have a number of CAFOs located in Michigan. If you take a look at this map here of lower Michigan, you all see that CAFOs noted, and in looking at the corresponding stars which indicate the beaches that have very high level of E. coli pollution. E. coli is a pathogen contained in CAFOs' generated waste. The map shows connection between CAFOs and the pollution on our beaches. Waste from CAFOs run into creeks, rivers, making its way to the shores of our lakes where we experience contamination and numerous beach closings.

Numerous studies have been performed regarding the effect of CAFO-generated waste on the public health, including the workers and the people who reside near these CAFOs. These studies have shown that many CAFO workers experience high rates of respiratory problems and other health ailments, and those residing near these locations have experienced similar adverse health effects. The American Public Health Association, Michigan State Medical Society, and the Canadian Medical Association have called for a moratorium on new CAFOs until sufficient additional scientific data on public health risk has been collected.

We should be holding industry accountable for the pollution they emit. The CERCLA and EPCRA reporting requirements seem like a common sense approach so that we know where, when, and how much hazardous substances are released that could be dangerous to the public. And until the scientific data from the Consent Decree that the EPA and 2,700 farming companies have entered into is finished, I think it is premature to exempt the agriculture industry from such laws. We don't exempt the factories or manufacturing plants in Detroit. The residents of Detroit and the residents of rural Michigan deserve the same public safeguards.

The Great Lakes area drinking water—the Great Lakes area drinking, water source for over 30 million Americans, their health and their future is not something to be taken lightly. I have concerns about exemptions for certain industry from environmental laws that could have long-standing negative impacts on a natural resource that cannot be replaced. I look forward to hearing from our witnesses, and thank you for the time, Mr. Chairman.

Mr. GILLMOR. The gentleman from New Hampshire, Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman. And I will just paraphrase my opening statement and submit it to the record. I want to thank you, all the witnesses, for being here today. I think it is imperative that, regardless of whether we are talking about an industrial plant, agricultural operation, or a small family farm, we have to be sure that these farms are being operated in an environmentally friendly manner and complying with Clean Air, Clean Water, and under other environmental regulations.

I guess the real issue here today is to here opinions on whether recent cases brought against large livestock operations are because the farms are not performing best practices or are they being brought to court under frivolous claims or inappropriate application of current environmental laws. I hope that the subcommittee can ensure that normal farm practices, as a definition, is not incorrectly manipulated and turned against farmers doing all they can do to comply with environmental laws. And many of them, I might note, work closely with the resource—Natural Resource Conversation Service and other agencies to find best practices. I was amazed to discover that my home State of New Hampshire, I have over 40,000 livestock, over 6,000 poultry, and over 6 million tons of—excuse me, not tons, 6 million pounds of manure a day. And I thought agriculture had all moved out to the Midwest, but it hasn't. It is not a small amount, and it is a critical issue in my neck of the woods, and most notably over in Vermont, we share a common river, the Connecticut River.

So I think this is an interesting hearing, Mr. Chairman, and I will look forward to hearing from our witnesses. And I yield back.

[The prepared statement of Hon. Charles Bass follows:]

PREPARED STATEMENT OF HON. CHARLES BASS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Thank you Chairman Gilmore.

I would like to first thank all of the witnesses for being here today. It is imperative that regardless of the type of facility—an industrial plant or a farm—we must ensure that it is being operated in an environmentally-friendly manner and is complying with the Clear Air Act, the Clean Water Act, and other environmental regulations.

Some may want to argue that this hearing today is the first attempt to exempt farmers from environmental laws and no longer hold them responsible for their emissions. I would have to disagree and I doubt anyone would want to see Congress give agricultural businesses an outright exemption from performing best practices to protect our air, water, and land. Many farmers are proud of their conservations efforts, especially since it does not serve the farmer well to contaminate his land to the point it will no longer be as productive.

The real issue today is to hear opinions on whether the recent cases brought against large livestock operations are because the farms are not performing best practices or are they being brought to court under frivolous claims or inappropriate application of CERCLA and other environmental laws. It is important for this Subcommittee to ensure that the description of ″normal farm practices″ is not incorrectly manipulated and turned against farmers doing all that is possible to comply with environmental laws—many of whom work closely with Natural Resources Conservation Service and other federal agencies to find the best practices to protect their farmland and our watersheds.

Many of my fellow colleagues have large livestock operations in their district with farmers who are fearful that they will be put out of business due to expensive court cost. My State of New Hampshire does not have these types of large operations, but similar concerns do extend to the New England small family farm. New Hampshire has 152 licensed dairy herds that produce about 330 million pounds of milk per year. In my district, there are 5,900 poultry, 4,037 cattle, 36,761 dairy cows, and several hundred other types of livestock. I am sure many of my colleagues here would assert these are definitely small operations and that my whole district could make up one of their facilities. However, the same issues from both the side of environment concerns and agricultural businesses still play out in New Hampshire. In one of our witness's testimony, he will state that up to 115 pounds of manure is produced per day by a dairy cow. So from my calculations, the cattle and dairy cows in my district are releasing over 6 millions pound per a day—not a small amount of waste and definitely a critical issue that needs to be addressed in how the waste is handled and its affect on watersheds and air quality. On the other hand, many of my farmers are nervous that the small farmer may eventually be unfairly brought to court or that egregious laws will be applied to them making it impossible for them to stay in operation- destroying a very integral part of my State. A particular concern is a potential clash between agriculture and residential development. All over my state we are seeing housing developments being built on old farmland—sometimes right up to an existing farm. It is not unrealistic for the farmer to be worried that the residential community next to his farm may complain about groundwater and clean air issues even though the farmer is working diligently to comply with emission regulations. Some of these farms have been in existence since the 1600s and would be put out of business by costly court fees on top of the large expense of running their farm as an environmentally-friendly operation.

Therefore, this hearing is important to the entire agriculture industry whether it is a large corporate farm with a thousand head of dairy cows at one facility or the small family farm with a few hundred head of dairy cows. We need to ensure that the farmers that are performing best practices are not burden with an inappropriate application of Superfund laws, but yet ensuring that there is a mechanism in place to go after agriculture operations that are not complying with regulations. It is also important as Congress we ensure that the mechanisms to help the farmer to comply with environmental regulations continue in the 2007 Farm Bill—such as Environmental Quality Incentives Program. Without these types of technical assistance, small farmers in particular will be at a disadvantage in continuing to ensure they are in compliance with federal, state, and local environmental regulations.

I'd like to thank the witnesses for being here and I look forward to their testimony.

Mr. GILLMOR. Gentleman yields back. The gentlelady from Wisconsin, Ms. Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman. I am sure that it is no surprise when I say that agriculture has been the lifeblood of my home State of Wisconsin's economy for well over a century. Today, Wisconsin's farms and agricultural businesses generate more than $51.5 billion in annual economic activity, and provide jobs for more than 420,000 people.

While agriculture has remained a vital component of Wisconsin's economy, the very nature of farming has changed drastically in every State over the last few decades. Small family farms that had been the bedrock of rural communities have increasingly been replaced or consolidated into large corporate farms, often growing large enough to be classified as concentrated animal feeding organizations, or CAFOs. It is estimated that 54 percent of U.S. livestock are now concentrated on 5 percent of livestock farms, with a typical CAFO raising thousands of animals in confined areas.

The growing—the growth of CAFOs is of concern to me. According to the Department of Agriculture, these mega-farms are already generating an estimated 575 billion pounds of animal manure every year. This amount of waste could pose serious threats to our environment and the public's health. Manure can contain harmful byproducts, such as heavy metals, antibiotics, pathogen bacteria, a number of toxic gasses, and over 400 separate volatile compounds. In Wisconsin, 59 manure spills have been reported over the last year, 12 of which contaminated private wells, and 12 more that killed fish in local streams.

In 2004, a Kewaunee County family fell seriously ill when a CAFO near their home irresponsibly spread liquid manure on frozen and snow-covered ground, which led to a massive manure runoff and eventual contamination of their drinking water supply. The most dramatic fish kill in Wisconsin occurred in early spring of 2005 when liquid manure spread over frozen ground ran off into the west branch of the Sugar River and killed a significant number of brown trout. Dane County, through which the Sugar River runs, had spent more than $1 million over several years restoring this once-prized trout stream before this spill.

I certainly have concerns about CAFOs impact on our environment and the public's health, however I also realize that our domestic food supply depends on a vibrant agricultural sector. I look forward to hearing from out witnesses today address the question of how we balance these interests. But, I must say that I have strong concerns about any effort to exempt CAFOs from the Superfund laws and the Emergency Planning and the Community Right-to-Know Act. I believe this would be a mistake. And, Mr. Chairman, I yield back the balance of my time.

Mr. GILLMOR. I thank the gentlelady. The gentleman from Idaho, Mr. Otter.

Mr. OTTER. Thank you, Mr. Chairman. Mr. Chairman, I am going to submit my remarks for the record and yield back my time.

Mr. GILLMOR. I thank the gentleman. Gentleman from Washington, Mr. Inslee.

Mr. INSLEE. Thank you, Mr. Chairman. Just one brief comment: I hope we might have some discussion about digesters and use of this material for energy as part of our discussion. Thank you.

Mr. GILLMOR. Gentleman from Oklahoma, Mr. Sullivan?

Mr. SULLIVAN. Thank you, Mr. Chairman. I appreciate you calling this hearing today to address the issue of Superfund laws and animal agricultural waste. This issue is of critical importance to my State of Oklahoma, and particularly northeastern Oklahoma. I would like to welcome two of our witnesses, Ms. Kelly Hunter Burch, Chief of the Environmental Protection Unit and Assistant Attorney General of Oklahoma, and Mr. Steve Kouplen, President of the Oklahoma Farm Bureau. I know that both of you have divergent positions on this issue, and I appreciate you being here to offer your views on how to address interstate agricultural waste, and specifically your views on the historical and current application of CERCLA to poultry waste.

As a Congressional Representative for the 1st Congressional District of Oklahoma, I represent the city of Tulsa, Oklahoma. In 2003, the city of Tulsa reached a settlement with Tyson Foods, and other poultry defendants, regarding excessive poultry waste in the Eucha and Spavinaw Watershed. This watershed is the principle source of water for the residents of Tulsa. The settlement is slowly producing results. The amount of poultry waste being applied to the land and the watershed has been cut by two-thirds, and the odor and taste of the water has improved, but the process is still ongoing and it will take years to know if the settlement has been successful. Unfortunately, politics and political pressures have muddied the waters on all sides of that issue. We need to get back on track toward dialog, and all parties need to come together to set principles for managing agricultural waste.

While I have concerns about CERCLA litigation, few can state that the excess poultry waste is not having a negative effect on Oklahoma's scenic waterways. The Oklahoma Attorney General has stated that the phosphorous from poultry waste from the Illinois River Watershed is equivalent to the waste that would be generated by 10.7 million people, a pollution greater than the State of Arkansas, Kansas, and Oklahoma combined. This is a problem. It is true that Oklahoma's scenic waterways are suffering from excess out-of-state poultry waste, and that this waste is negatively impacting the quality of life of Oklahomans.

The subcommittee has an opportunity today to ask several questions and look at the potential economic impact of these lawsuits. Currently, 508 Oklahoma poultry farms are located in the Illinois River Watershed, and they would be negatively impacted if animal manure is found by the courts to be a hazardous waste under CERCLA. If CERCLA is amended to exclude animal manure, we also need to look at what resource will the State and municipalities have to respond to environmental demands resulting from excess agricultural waste in the scenic waterways and the drinking water supply, and whether mechanisms under the Clean Water Act sufficiently address these environmental concerns.

I look forward to the hearing, hearing the testimony from our panel of witnesses, and I yield back the balance of my time. Thank you.

[The prepared statement of Hon. John Sullivan follows:]

PREPARED STATEMENT OF HON. JOHN SULLIVAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. Chairman, I appreciate you calling this hearing today to address the issue of Superfund laws and Animal Agriculture waste. This issue is of critical importance to my state of Oklahoma, particularly Northeastern Oklahoma.

I would like to welcome two of our witnesses, Ms. Kelly Hunter Burch, Chief of the Environmental Protection Unit and Assistant Attorney General of Oklahoma, and Mr. Steven Kouplen President of the Oklahoma Farm Bureau. I know that both of you have divergent positions on this issue and I appreciate you being here to offer your views on how to address interstate agriculture waste and specifically your views on the historical and current application of CERCLA to poultry waste.

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I look forward to hearing the testimony from our panel of witnesses and I yield back the balance of the time.

Mr. GILLMOR. Gentleman yields back. The gentleman from Georgia, Mr. Deal.

Mr. DEAL. Thank you, Mr. Chairman. Everybody comes to this hearing today with a point-of-view, I am sure, and we are looking forward to the point-of-view of the witnesses, and I welcome all of you here. My point-of-view is that my State of Georgia, for the 21st consecutive year at the end of 2004, was the No. 1 producer of broilers in this country. My County and my city of Gainesville, Georgia, calls itself the poultry capital of the world. We have about 1.3 billion broilers produced in my State every year. Now, most of those are being produced on small family farms. Although the industry itself is integrated, the poultry houses and the land on which they are located are generally owned by small individual farm units, and the impact of legislation or extension of legislation such as extending Superfund liability to them, could have a disastrous effect.

I think all of us are concerned about the issue of pollution. I think the agriculture industry has been more than responsive in that area. Not only do we have the protections of the total maximum daily load that they are complying with, we also have, of course, the provisions of the Clean Water Act that they are complying with along with State rules and regulations and laws that regulate them as well. So I believe that it is important that we get the facts and we get them correct. I am also pleased that—to be an original co-sponsor of the legislation that Mr. Hall referred to earlier, which hopefully will be a legislative clarification of the previous intents of Congress.

But, I do look forward to this hearing, and I thank the witnesses, and I yield back my time.

Mr. GILLMOR. Gentleman yields back. The gentleman from Pennsylvania, Mr. Murphy.

Mr. MURPHY. Mr. Chairman, I will submit my comments to the record, but I do want to say on behalf of the many poultry farmers in Pennsylvania, and dairy farmers, I want to thank you for having this hearing.

Mr. GILLMOR. Thank you very much. The bells you heard go off indicate that we have two votes, and we have 15 minutes from the first bell to vote. I want to ask you, Mr. Breen, if possible, I would like to get your testimony in, and you have been through this so many times, I am sure you can do it in 5 minutes.

Mr. BREEN. Five minutes?

Mr. GILLMOR. Thank you very much.

STATEMENT OF BARRY BREEN, DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY

Mr. BREEN. You are welcome. Good afternoon. My name is Barry Breen, and I am the Deputy—thank you. I appreciate it.

I am Deputy Assistant Administrator for EPA's Office of Solid Waste and Emergency Response. Thank you for inviting me to appear today to discuss the application of CERCLA and the Emergency Planning and Community Right-to-Know Act, EPCRA, on animal agricultural operations. I will summarize my testimony and ask that the entire written statement be submitted for the record.

Mr. GILLMOR. Without objection.

Mr. BREEN. What I have to report to you today is a status report on our work-in-progress. There are some things we know, and some things we don't know. We are working to find out some of the things we don't know. These are particularly true in the area of science and practical applications and implications, but we are mindful that this is an important issue, we need to move expeditiously.

As background, CERCLA requires that any person in charge of a facility notify the National Response Center, the NRC, as soon as he or she has knowledge of the release of a hazardous substance from that facility at quantities equal to or greater than the reportable quantities, the RQs. Similarly, EPCRA requires that local emergency planning committees be notified, and that the State emergency response commissions likely to be affected of extremely hazardous substances also be notified.

Neither CERCLA nor EPCRA limit the industry or commercial sectors that need to report. Any facility releasing more than an RQ must report. CERCLA and EPCRA release reporting requirements provide useful information for State and local planning committees and serve the public and the EPA in identifying facilities that release reportable quantities of hazardous substances. CERCLA and EPCRA authorize and enforcement for failure to report releases of hazardous substances that equal or exceed their RQs. However, with one exception that I know of where EPA and the Justice Department intervened in an already on-going private party Clean Water Act case, EPA has never relied on these authorities as the primary reason to take action against an animal feeding operation facility owner or operator, and in no case has any response been taken that I know of on an animal feeding operation related to releases of hazardous substances from manure. EPA has not targeted agricultural operations for CERCLA or EPCRA reporting actions, and as far as I know, we have no plans to do so.

What EPA has done is develop voluntary enforcement agreements with animal feeding operations. Under the AFO Air Compliance Agreement, respondents pay a penalty to resolve potential civil liabilities and to fund an extensive national AFO air monitoring study. This study will specifically address some of the science that we need, the data, and the emission estimating methodology needs that the National Academy of Sciences has reported that we need.

Approximately 2,700 proposed agreements have been submitted to EPA, covering more than 6,000 pork, poultry, and dairy farms.

Last week, on November 9, EPA submitted the first set—approximately 20—of these agreements to the Environmental Appeals Board for approval. We are keenly aware that several recent court decisions have generated concern. However, EPA was not a party to that litigation, and we do not have positions on many of the issues in the litigation. We have received the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association petition for exemption from EPCRA and CERCLA. We are currently reviewing the petition and will soon make the petition available for public comment through a docket. A Federal register notice will announce the availability of the petition, along with a specific request for public comment.

I would like to reiterate that the notification provisions of CERCLA and EPCRA allow the Federal Government and State governments to evaluate and appropriately respond to releases of hazardous substances. EPCRA specifically allows the public to participate through community involvement and the Community Right-to-Know provisions. EPA appreciates that there remain a number of issues of interest to the agricultural community, and that there is also significant Congressional and public interest in the outcome as well. We are actively working to resolve these issues, consistent with the mission of the EPA.

That concludes my remarks, Mr. Chairman, and, at your convenience, I will be happy to respond to any questions.

[The prepared statement of Barry Breen follows:]

Prepared Statement of Barry Breen, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency

Mr. Chairman and members of the Subcommittee, I am Barry Breen, Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response at EPA. Thank you for inviting me to appear today to discuss environmental issues involving animal agricultural operations. My testimony will address issues regarding the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-To-Know Act (EPCRA) to animal agricultural operations; or sometimes called animal feeding operations (AFOs).

BACKGROUND

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 103(a) requires that any person in charge of a facility notify the National Response Center (NRC), as soon as he has knowledge, of the release of a hazardous substance from that facility in quantities equal to or greater than those determined under section 102(b) of CERCLA. Those quantities are called the Reportable Quantities or RQs. Similarly, EPCRA section 304 requires that the local emergency planning committee (LEPC) for any area likely to be affected, and the State emergency response commission (SERC) of any State likely to be affected by the release of an extremely hazardous substance listed under EPCRA Section 302 also be notified. Neither CERCLA nor EPCRA limit the industry or commercial sectors that need to report; therefore any facility releasing more than an RQ must report. With respect to AFOs, the CERCLA hazardous and EPCRA extremely hazardous substance most likely to trigger an RQ are (1) ammonia at 100 pounds per 24 hours, and (2) hydrogen sulfide also at 100 pounds per 24 hours. Ammonia is most often used at a farm as fertilizer and thus, is stored in tanks and can be released. However, at AFOs, another likely release source of these hazardous substances is the agricultural waste that is either stored or placed on the facility.

The National Contingency Plan (NCP) at 40 CFR 300.125, sets forth the requirements for notification and communications with the National Response Center (NRC). The NRC is located at the United States Coast Guard Headquarters and is the continuously manned national communications center for handling activities that may require an emergency response action. The NRC acts as the single point of contact for all pollution incident reporting. Notices of releases are made to the NRC by telephone and are immediately relayed to the appropriate predetermined federal on-scene coordinator (OSC). The telephone report is distributed to any interested National Response Team member agency or federal entity that has established a written agreement or understanding with the NRC. The NRC also evaluates incoming information and immediately advises the Federal Emergency Management Agency (FEMA) of a potential major disaster situation.

As noted above, the purpose of the release reporting is to alert appropriate first responders and to keep state and local entities informed. However, not all chemical releases reported to the NRC are necessarily "emergencies." In addition, there are times when an industrial facility will release a hazardous or extremely hazardous substance at quantities above the RQ but for a longer duration than what might be judged to be in an emergency situation. In such a case, CERCLA section 103(f)(2) provides for exemptions from notice and penalty provisions for continuous releases of hazardous substances. Releases may be reported less frequently than otherwise would be required, if they are "continuous" and "stable in quantity and rate," and if notification has been given under section 103(a) "for a period sufficient to establish the continuity, quantity, and regularity" of the release. Hazardous substance releases that are continuous and stable in quantity and rate may be reported under a reporting scheme set forth in 40 CFR 302.8—Continuous releases. The basic structure for continuous release reporting requires the owner or operator of the facility to make an initial telephone call to the NRC stating that he intends to submit a continuous release report. That initial call is followed by a written report, within 30 days, to the appropriate EPA Regional office where the release is occurring. Each year on the anniversary of that report, the facility owner or operator must review the release report to determine if changes have occurred in any of the previously submitted information. For example, the rate of release, source, composition, contact information, or facility ownership may have changed since the previous report. If so, then the facility owner or operator must provide a follow-up notification report within 30 days of the anniversary that updates the information submitted in the original notification. The continuous release reports should also be submitted to the appropriate SERC and LEPC to satisfy the EPCRA section 304(c) notification requirements.

Section 109 of CERCLA and section 325 of SARA Title III authorizes EPA to assess civil penalties for failure to report releases of hazardous substances that equal or exceed their RQs. Section 103(b) of CERCLA, as amended, authorizes EPA to seek criminal penalties for failure to report releases of hazardous substances and for submitting false or misleading information in a notification made pursuant to CERCLA section 103. Except for the case described below where the Government settled with the nation's second largest pork producer, Premium Standard Farms, Inc. (PSF), and Continental Grain Company, Inc. when it intervened in a private party CWA case, EPA has never relied on these authorities as the primary reason to take action against an AFO facility owner or operator and in no case has any response been taken on an AFO related to releases of hazardous substances from manure.

Several recent court decisions have generated concern among some in the animal agricultural operations industry about the CERCLA and EPCRA notification and reporting requirements. However, EPA was not a party to the litigation. Further, EPA does not have positions on many of the issues in the litigation. The heightened attention has prompted the National Chicken Council, National Turkey Federation and U.S. Poultry & Egg Association to submit a petition for exemption from EPCRA and CERCLA reporting requirements for ammonia emissions from poultry operations. The Agency is currently reviewing this petition and will soon make this petition available for public comment through its docket. A Federal Register notice will announce the availability of the petition along with a specific request for public comment.

EPA PROGRAM IMPLEMENTATION

Under CERCLA, the U.S. Environmental Protection Agency, must be notified when there was a release of a hazardous substance into the environment. CERCLA defines what those hazardous substances are by referring to several other environmental statutes but it also gives the Agency the authority to designate additional hazardous substances which when released into the environment may present substantial danger to the public health or welfare or the environment. The Agency was also required by CERCLA section 102(a) to promulgate regulations establishing the quantity of any hazardous substance that if released shall be reported pursuant to

CERCLA section 103(a). Every year, the NRC receives thousands of reports of releases of hazardous substances.

Section 300.130 of the NCP sets forth the requirements to determine whether to initiate a response. In the past, federal response has been limited to the release of ammonia or hydrogen sulfide to air from animal agricultural operations from chemicals stored on-site in tanks. EPA is examining whether changes should be made to reduce the burden on the industry. The CERCLA and EPCRA release reporting requirements provide useful information for State and local planning committees and serve the public and the Agency in identifying facilities that release reportable quantities of hazardous substances.

To date, there has only been a single matter in which EPA has issued a finding of violation (FOV) against a farm for violations of CERCLA 103 and EPCRA 304, although the FOV primarily focused on CWA section 301 and CAA section 110 violations. In that case, the Government settled with the nation's second largest pork producer, Premium Standard Farms, Inc. (PSF), and Continental Grain Company, Inc. The settlement resolved alleged violations of the Clean Water Act (CWA), CAA, CERCLA and EPCRA that occurred at a number of the companies' factory farms in northwest Missouri. It is important to note that the Government intervened in a private party CWA case and the government did not initiate the action.

After an NAS study found that that scientifically sound and practical protocols for measuring air emissions from AFOs needed to be developed, EPA concluded that the better course was developing the AFO Agreement, followed by emissions estimating methodology. EPA may use CERCLA authority to respond to certain catastrophic releases of hazardous substances or wastes such as from a lagoon failure near a public waterway.

AFO AGREEMENT

In late 2001, discussions began between EPA and representatives from the AFO industry on the concept of a voluntary enforcement agreement that would ensure compliance with federal laws pertaining to air emissions. In December of 2001, EPA and the U.S. Department of Agriculture also asked the National Academy of Sciences (NAS) to review and evaluate the scientific basis for estimating emissions of various air pollutants from AFOs. The NAS issued a final report in February, 2003 concluding that scientifically sound and practical protocols for measuring air emissions from AFOs needed to be developed. The NAS also found that existing methodologies for estimating air emissions from AFOs are generally inadequate because of the limited data and site specific factors on which they are based. In response to the 2003 NAS report, EPA began revising the conceptual enforcement agreement to specifically address the data and emission-estimating methodology needs, thus beginning to address the needs cited by the NAS, and determining AFO regulatory responsibility under the CAA, CERCLA, and EPCRA. Over the next two years, EPA sought input and comment on drafts of the enforcement agreement from many groups, including state officials, representatives from the agricultural industry, environmental organizations, and local citizen groups.

On January 31, 2005, EPA published a notice in the Federal Register offering animal agricultural operations an opportunity to sign a voluntary Consent Agreement and Final Order. The deadline to sign the proposed Agreement was August 12, 2005. Approximately 2,700 proposed Agreements have been submitted to EPA, covering over 6,000 pork, poultry, and dairy farms. In its January 31, 2005 notice, EPA also requested public comment on the proposed Air Compliance Agreement, and received over 600 unique comments.

Under the AFO Air Compliance Agreements, Respondents pay a penalty to resolve potential civil liability and participate in funding an extensive, national AFO air monitoring study by contributing up to $2,500 per farm into an EPA-approved monitoring program. The civil penalties range from $200 to $1000 per farm covered, depending on the size of the farm, with an absolute penalty cap of $100,000 per Respondent regardless of how many farms are covered.

The monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will allow Respondents to determine and comply with their regulatory responsibilities under the CAA, CERCLA, and EPCRA. Once applicable emission-estimating methodologies have been published by EPA, the liability release in the proposed Agreement is contingent on the Respondent certifying that it is in compliance with all relevant requirements of the CAA, CERCLA, and EPCRA. In return, Respondents receive a release and covenant not to sue for the specific violations identified by applying the relevant emissions-estimating methodologies as long as the participating animal agricultural operations comply with all of their obligations under the Agreement.

The AFO Air Compliance Agreement is an important part of EPA's strategy to address air emissions from AFOs. In addition to resolving the compliance status of AFOs under the relevant statutes, it will provide critical data that will allow EPA to quantify emissions coming from AFOs and, if necessary, to identify appropriate regulatory and nonregulatory responses for controlling those emissions.

On November 9, 2005, EPA submitted the first set of AFO Air Compliance Agreements to the Environmental Appeals Board for approval. We anticipate that the Board will consider the submitted Agreements within the next several months. Assuming Board approval, EPA has made a determination that there is adequate participation and representation to warrant proceeding with the national air monitoring study for egg-layer and swine AFOs. We are still processing and reviewing Agreements from the other animal sectors and have not made a decision yet of adequate participation and representation for dairy and meat-bird AFOs, but expect to do so soon.

CONCLUSION

In conclusion, I would like to emphasize that the notification provisions under CERCLA and EPCRA allow for the Federal government to evaluate and appropriately respond to releases of hazardous substances. EPCRA specifically, allows the public to participate through its community involvement and community right-to-know provisions. EPA appreciates that there remain a number of issues of interest by the agricultural community yet to be addressed by the Agency and that there is also significant Congressional and public interest in the outcome as well. Let me assure you that EPA is actively working to resolve these issues consistent with the mission of the U.S. Environmental Protection Agency to be protective of human health and the environment.

Mr. GILLMOR. Thank you very much for your testimony. At this point, I think we will go into recess so that the members may vote, and as soon as the votes are over, we will come back and we will begin with a round of questions of Mr. Breen, and then we will go to the second panel. And to those on the second panel who haven't testified before, I want to guarantee you we will not subject you to another round of opening statements. We will go straight to testimony and questions.

Stand in recess.

[Brief recess.]

Mr. DEAL [presiding]. I will call the hearing back to order. Chairman Gillmor has a mark-up going in another Committee and requested that I preside in his absence, so he will be back before the next panel, I hope.

Mr. Breen, I will—excuse me. I will begin the questioning, and we will not have long questioning if we don't have some more members show up here.

First of all, with regard to this issue, if we don't consider that any of the so-called Superfund-type legislation applies, isn't it true that you still have fairly substantial regulation that would apply to these large agricultural operations?

Mr. BREEN. Mr. Chairman, I believe that is true, although Air and Water is a little beyond my regular ken so I couldn't talk about that in detail.

Mr. DEAL. Right. But you are, of course, familiar with the general requirements of total maximum daily load requirements, et cetera, that if violations of the permits that are granted are violated, that certain recourses could be had, both civil and criminal consequences, I believe?

Mr. BREEN. Yes. Violations of a permit can often lead to a civil enforcement. Criminal probably involves a certain mental state of mind that I am less able to detail.

Mr. DEAL. With regard to the agreements that you alluded to in your opening statement, would you repeat for me how many of those agreements have actually been entered into?

Mr. BREEN. Yes. We have 2,700 companies that have submitted agreements, signed up for the agreements, representing somewhat over 6,000 separate farms.

Mr. DEAL. And is the primary purpose of that to simply collect data and information? Is that the primary purpose of it? I know it does grant some immunity as a part of the agreement, but you are primarily trying to gather some data, is that correct?

Mr. BREEN. That is right, Mr. Chairman. For a certain period of time, there is certain covenants not enforced during that period of time, but the benefit for the public is at least as much to get the scientific studies going that will take about 2 years to complete. But we hope to get data much faster than to have to wait the full 2 years to get the data.

Mr. DEAL. I recall conversations that I had with the poultry industry, which is the primary industry as I indicated in my opening statement in my Congressional District. I believe that there was some reluctance on the part of some within that industry, but I think that the National Chicken Council agreed that they would fund a study with the protocols that you had suggested, that they would self-fund a study to achieve that same kind of information. Am I correct?

Mr. BREEN. I just can't confirm or disagree with that. I just don't know.

Mr. DEAL. But if they were to do that and apply the same protocols and reporting information, that would be helpful, I suppose, in this information-gathering stage?

Mr. BREEN. Yes. The science from any source would be helpful.

Mr. DEAL. All right. I believe that will be all for me. And, Ms. Solis, I will recognize you.

Ms. SOLIS. Thank you, Mr. Chairman. Mr. Breen, it appears to me that there is significant confusion and misinformation on this topic regarding the responsibilities and authorities of the Superfund's implementation, and I would like to ask you some questions. And because I don't have a lot of time, if you could give me a simple yes or no. So the first question I have is is it correct that the natural resource damage actions under Section 107 of Superfund can only be brought by Federal, tribal, or State Natural Resource trustees?

Mr. BREEN. I will do my best to give you a yes and no as best it can be honest and fair. Section 107F provides that liability for natural resource damages is to state, Federal, and tribal governments. I am not aware of any successful citizen suit that has expanded that provision.

Ms. SOLIS. Okay. Second question is is a citizen suit action available under Superfund for natural resource damages?

Mr. BREEN. I am not aware of any successful action in that regard.

Ms. SOLIS. So you are not clear on that at this time, okay. Is it correct that the injunctive relief and imminent and substantial endangerment authority under Section 106 can only be exercised by the President and not citizen suits under Superfund?

Mr. BREEN. Section 106 Injunctive Relief is only available to the Federal Government.

Ms. SOLIS. And can a city or an individual with a citizen suit force the President to list a site on the National Priorities List?

Mr. BREEN. No, that is a discretionary function.

Ms. SOLIS. Okay. And is it also correct that the Superfund definition of release excludes the normal application of fertilizer?

Mr. BREEN. I will want to double-check, but I believe you are right.

Ms. SOLIS. Yes. And manure qualifies as a fertilizer, is that correct?

Mr. BREEN. I don't know that we have a clear statement on that.

Ms. SOLIS. And so will you get back to us to clarify that?

Mr. BREEN. One of the things we are doing is to try to look for ways that we need to be clearer in this area of considerable confusion, as you have said, and whether we can be clearer in that way in a way that is helpful—and there are several other ways we might be clearer—is something we are looking into.

Ms. SOLIS. Okay. Then my next question is if manure—therefore manure would not be a release under the statute if it was normally applied?

Mr. BREEN. Again, I expect that all those words have—freighted with meaning in particular factual circumstances, so I think we would need to see what each of those things mean on a certain set of facts each time.

Ms. SOLIS. Okay. And have any companies in the farm community asked EPA and the Administration to issue guidance to further explain how the term "normal application of fertilizer" should be interpreted for the purpose of Superfund statute?

Mr. BREEN. We have received requests for clarification. Whether that clarification request goes to that specific issue, I am just not personally familiar at the moment.

Ms. SOLIS. Can you submit that information to our Committee?

Mr. BREEN. Yes.

Ms. SOLIS. Okay. And then also, Mr. Breen, is it correct that 2,700 companies representing the various agricultural sectors who have signed the Air Compliance Consent Agreement have agreed to report releases of hazardous substances such as ammonia and hydrogen-sulfide over reportable quantities under Section 103 of Superfund and under the Emergency Planning and Community Right-to-Know Act once the proper methodology and procedures are determined and EPA promulgates the rules?

Mr. BREEN. My understanding is that once the situation is clarified by some of the facts we hope to gather through the scientific study, that then entities that entered into a—would have 120 days to start reporting, if applicable.

Ms. SOLIS. And then, last, are there any regulatory consequences after someone files a report stating releases of ammonia over 100 pounds a day?

Mr. BREEN. No regulatory consequences in the CERCLA area. I couldn't speak to whether there are in any other—any other State law, for example.

Ms. SOLIS. Okay. I yield back the balance of my time.

Mr. DEAL. I thank the gentlelady. Mr. Sullivan?

Mr. SULLIVAN. Thank you, Mr. Chairman. Thank you, Mr. Breen, for being here. And I have been in Congress about 4 years and the first meeting I had was with Christine Todd Whitman in my office right after I got sworn in, and we have a huge issue in my State about the poultry issue and other pollutants that get in the water affecting Tulsa, which is 82 percent of my Congressional District, and it has been very frustrating, I hate to say, with all due respect, dealing with the EPA. They are very effective at saying nothing and doing nothing, I think.

Even some of the comments, I am sure, were written for you. It said here, “several recent court”—this is a good example—“several recent court decisions have generated concern among some of the animal agriculture operations industry about CERCLA and EPCRA notification and reporting requirements. However, EPA was not party to the litigation. Further, EPA does not have positions on many of the issues in the litigation.” And we have a hard time—you know, with Arkansas and Oklahoma working and we always try to—EPA will come down, say, you know, they put on a show, and—but they don’t—nothing happens. They say, we want you guys to work it out, and it has been difficult. We have had some breakthroughs in some of the negotiations, but could you please detail for me EPA’s actions to encourage settlement in mediation—you know, we don’t need lawsuits. We can do it through that way—of water quality issues between Oklahoma and Arkansas and the poultry industry? Is there a role that you have?

Mr. BREEN. Thank you.

Mr. SULLIVAN. Because I want to tell you one other thing, too. In my district, I have home builders who have a silt fence, might fall over from a kid riding their bike over it in a neighborhood they are building, and the Region 6 people will come up and fine them. If someone spills some paint out there, they get fined. I mean, stuff like that happens, but no one is addressing this, and I just wanted to know what you have to say.

Mr. BREEN. First of all, let me apologize on behalf of the Agency for the frustration that you feel. Certainly that would never be our intent, and I apologize.

One of the things we are trying to do in this area is look for common ground, and one area of common ground might be to work with States in the near-term to look for ways to make the reporting obligations less burdensome. I don’t want to overcompensate in either direction, and I recognize—we all do—that States and local governments have an important role in this. And so one thing I hope that the Agency will do in the very term will be to reach out to states and local governments and find out how much need they have for this information, and what uses they put to it, and whether there are ways that we can use reports that are already submitted to State governments to do double job, that they can satisfy CERCLA and EPCRA obligations in addition to whatever State law obligations they serve.

That kind of sort of search for ways that are win-win for everybody is something I think is useful in a first step, but I don’t know how far it will take us, and we would be happy to report back to you and others once we have gotten a certain way down that road as to how much we can accomplish.

Mr. SULLIVAN. Well, if we have two parties, Oklahoma and Arkansas, wanting to work together with the poultry industry, they are kind of—they want to come together. It is very difficult because there are divergent views and it is tough and there is a lot at stake, what—I mean, can you come in and be some kind of—I guess I envision that you can, since you are the EPA of the Federal Government, come in and kind of corral everybody, kind of get them together to work. Is that not what the EPA would do? Is that not a role of a Federal agency to do that——

Mr. BREEN. Thank you.

Mr. SULLIVAN. [continuing] in the United States?

Mr. BREEN. Thank you. I want to be careful that we would only do so in a situation where we would add more light than heat, and not rile things up more just by being there. I am not aware in that particular situation that parties have asked us to join in in that way and mutually agreed that that would be helpful. Often it is a neutral that people that would seek, not a Federal agency.

Mr. SULLIVAN. If I as a Congressman asked, and other members of my delegation asked, would that be appropriate to have you come in and help these parties figure something out without a lawsuit?

Mr. BREEN. Congressman, naturally, your asking would be very important, but how we would react, I would have to take back and think through what the people closest to that issue.

Mr. SULLIVAN. You said in this statement that you submitted that you have—the EPA, where it says here in your testimony, you state that “the EPA does not have positions on many of the issues involved in the litigation between the animal agriculture industry, states and the municipalities.” What issues in the litigation, if any, does the EPA have a position on? It says many.

Mr. BREEN. Right.

Mr. SULLIVAN. There may be some.

Mr. BREEN. Thank you. I actually haven’t read all the briefs and all the complaints, so I can’t tell you what issues are raised that we have already dealt with and briefed on behalf of the United States. I have not gone through and catalogued in that way.

Mr. SULLIVAN. Would you think the EPA would state a position on something in it?

Mr. BREEN. I am not sure——

Mr. SULLIVAN. Doesn’t any——

Mr. BREEN. [continuing] that we would naturally wander into other litigation and state positions unless it had been something that we already had a position on because of some litigation we had been part of.

Mr. SULLIVAN. Also, one more question, does the EPA have any plans to clarify what livestock producers’ obligations are, if any, under CERCLA?

Mr. BREEN. Yes, we do hope to make some progress in that area, starting with getting some burdens reduced as much as we can and then seeing if further clarification will be helpful beyond that.

Mr. SULLIVAN. Okay. Thank you, Mr. Chairman.

Mr. DEAL. Thank you. Mr. Stupak?

Mr. STUPAK. Thank you, and thank you, Mr. Breen. Are the reporting requirements and response requirements under CERCLA and EPCRA overly burdensome for the large CAFOs?

Mr. BREEN. I suppose you would have to ask them that.

Mr. STUPAK. Well, I am looking on page 3 of your testimony, you talked about Tyson's Foods, the world's largest meat producer, enjoyed $26.4 billion in sales, and realized $1.9 billion in gross profits in 2004. Smithfield Foods, the Nation's largest hog producer, generated $9.3 billion in sales, and $227 million net income. And it goes on, it says, "revenue and profits continue to grow each year." So I guess I am taking it from your testimony it is not overly burdensome then.

Mr. BREEN. Actually, you may be reading somebody else's testimony.

Mr. DEAL. It is testimony from the second panel, one of the witnesses——

Mr. STUPAK. Somebody gave me the wrong testimony, so I can't attribute it to you. Sorry.

Mr. BREEN. I wish I were that smart.

Mr. STUPAK. I was giving you all the credit. Let me ask you this one then, in January 2003, the GAO Report on Livestock/Agriculture used 11,500 as the estimated number of confined animal feeding operations in this country. How many are required to have a Clean Water National Pollutant Discharge Elimination System permit and how many have actually been permitted, do you know?

Mr. BREEN. Let me get you that answer for the record, sir. I don't know off the top of my head.

Mr. STUPAK. Okay. Let me ask you this one then. If a discharge from an agriculture operation into surface water has a Clean Water Act permit, would it be exempt from CERCLA Section 103 and EPCRA Section 104 Notification Requirements?

Mr. BREEN. This is the federally permitted release——

Mr. STUPAK. Right.

Mr. BREEN. [continuing] exemption? Although I am familiar with the exemption, I have not tracked back whether it tracks to both the reporting or the response. Either or both, I don't know.

Mr. STUPAK. Okay. I am looking at your document here. This is the EPA Questions/Answers to Release Notification Requirements and Reportable Quantity Adjustments.

Mr. BREEN. Okay.

Mr. STUPAK. Okay. And I am looking on page 28, number 56. What is the scope of the federally permitted release exemption and such as Section 101-10 defines federally permitted release in terms of releases per minute, honoring a number of other environmental statutes, releases they are federally permitted or exempt, not only from CERCLA 103 and EPCRA Section 103 Notification Requirements, but from CERCLA liability as well.

Mr. BREEN. Thank you.

Mr. STUPAK. That answers that question then, right?

Mr. BREEN. If it is in our fact sheet, I am sure it is right.

Mr. STUPAK. Okay. Let me ask this question: some of the highest fugitive air emissions for ammonia reported in 2003 EPA Toxic Release Inventory were from poultry operations in Ohio. How many reports for ammonia in EPCRA has the EPA received in the last 2 years from family farms and how many from COFAs?

Mr. BREEN. Okay. I can help a little on that, although I don't know if I can nail it down quite the way you framed it. We get—we being the National Response Center, the NRC, which is actually staffed by the Coast Guard—gets approximately 32,000 to 34,000 incidents reported per year of all types, and that is over the last 5 years. I haven't seen 2005 data. That is 2000 through 2004. Of that 32,000 to 34,000, about 11,800 to 13,000 per year are from fixed sources. So lots are from railroads, you know, pipelines, things that wouldn't really be a part of the universe we are thinking of here. Of that 11,800 to 13,000, a little over 1,000 per year—1,041—are from ammonia, and an average of 556 are from hydrogen-sulfide. And there is a split in there between episodic and continuous releases that I can get—go down, drill down further on that if you would like.

We asked one of our best folks to go back for 1904 and look at which of those were confirmed from animal feeding operations. For 2004 on the ammonia side, of the 1,041 ammonia reports received from fixed sources, we were able to confirm that 45 were from animal feeding operations, six episodic, and six continuous. On the hydrogen-sulfide side, of the average of 556 per year, in 2004, 25 were confirmed from animal feeding operations, none episodic, and 25, all 25, were from continuous releases. But, I ought to caution you two things in using these numbers.

First, we don't know what is unreported, we only know what is reported. And, second, it is not always clear from a preliminary review of the report whether we are able to confirm that the source is an animal feeding operation or not. Sometimes it is something like—or call in, I smell something in the air, and by looking at that, it is not clear where it came from. But I was able to tell you where we were able to confirm it, based on a preliminary review.

Mr. STUPAK. Well, in these reports in the animal feeding lots there, has there been any regulatory consequences after they report? I mean, you have these reports coming in. Are there any regulatory consequences then?

Mr. BREEN. Well, one thing I would like to help find out for you is what State governments needs for is in this information area. I don't have that information available at the moment.

Mr. STUPAK. Okay. So I'm looking here at your 2003 report, onsite, offsite. When I take a look at it on the fugitive air emissions number 8, number 10, number 20, and then they are ranked by the amount of emissions. The top three of 20 are from Ohio, and it looks like poultry producers in that State. Does that sound correct?

Mr. BREEN. You are looking at the Toxic Release Inventory?

Mr. STUPAK. Yes.

Mr. BREEN. Actually, that is a separate provision. The Emergency Planning and Community Right-to-Know Act splits——

Mr. STUPAK. Correct.

Mr. BREEN. [continuing] fairly neatly into two halves, and what I have been talking about up until now was the Emergency Planning half rather than the Community Right-to-Know half. I don't have an ability to second-guess the numbers on the Toxic Release Inventory.

Mr. STUPAK. Thank you.

Mr. DEAL. We have two members who are close by. As Mr. Dingell is outside, we will recognize him next for questions.

Mr. DINGELL. Mr. Chairman——

Mr. DEAL. You are recognized, Mr. Dingell.

Mr. DINGELL. [continuing] thank you for your patience. Mr. Breen, I, first of all, will be submitting a letter to you asking a number of questions on this legislation that have not been included in your testimony or, I think, in the testimony of other witnesses. Mr. Chairman, I ask unanimous consent that that letter and the response that Mr. Breen sends on behalf of EPA be inserted in the record.

Mr. DEAL. Without objection.

Mr. DINGELL. Mr. Breen, referring to premium standard farms, they had 900,000 hogs under confinement, and they make application of 750 million gallons of animal waste to the surrounding acreage annually. Is it—does this have a potential for risk to the human health?

Mr. BREEN. First, Mr. Dingell——

Mr. DINGELL. Just yes or no.

Mr. BREEN. I am not sure I can fairly answer——

Mr. DINGELL. It does or it doesn't?

Mr. BREEN. [continuing] it with yes or no, sir.

Mr. DINGELL. You are going to tell me that it is perfectly safe?

Mr. BREEN. No.

Mr. DINGELL. Are you going to tell me it is not safe?

Mr. BREEN. What I wanted to do was make sure we had our numbers down right.

Mr. DINGELL. All right. 900,000 hogs I got, 750 million gallons of annual waste.

Mr. BREEN. The figures I have are 2 million hogs a year——

Mr. DINGELL. Two million hogs.

Mr. BREEN. [continuing] at a dozen facilities.

Mr. DINGELL. I apologize to you. And how much waste?

Mr. BREEN. I don't have that figure.

Mr. DINGELL. Now——

Mr. BREEN. But not 2 million at one facility, sir. Two million at about a dozen facilities.

Mr. DINGELL. Okay. Now, I have been out in Colorado where they have Montfort, you have heard of it?

Mr. BREEN. Sorry?

Mr. DINGELL. Montfort, M-o-n-t-f-o-r-t. You can smell it for 30 miles up and down the front range. It is a huge cattle feed lot operation. Now, this—I found this in the EPA Fact Sheet in the Premium Farm Standard case. It says as follows, "Significant human health and environmental risks are generally associated with large-scale concentrated animal feeding operations (CAFOs). Improper handling of manure from feedlots, lagoons, and improper land application can result in excessive nutrients (nitrogen and phosphorous); pathogens (fecal coliform); and other pollutants in the water. This pollution can kill fish, cause excessive algae growth, contaminate drinking water. In addition, pollution—emissions of air pollutants from very large CAFOs may result in significant health effects for nearby residents." Do you agree with that?

Mr. BREEN. I did not bring that fact sheet with me. I did bring the Agency's——

Mr. DINGELL. But do you agree with it?

Mr. BREEN. —Toxic Substances and Disease Registry Fact Sheets with me.

Mr. DINGELL. Do you agree with it?

Mr. BREEN. I would have to have it in front of me, sir, and be able to carefully read it.

Mr. DINGELL. Sir, I'm reading out of the EPA Fact Sheet.

Mr. BREEN. I will let it stand for what——

Mr. DINGELL. Maybe——

Mr. BREEN. [continuing] it says.

Mr. DINGELL. Maybe you have differences with EPA on matters involving health. Am I correct on that? All right. Now, 2 million hogs, how much—they would produce fecal matter or animal waste in amounts that would approximately equal that of a city of what size?

Mr. BREEN. I would have to get you that number for the record.

Mr. DINGELL. Would it be a hick town or would it be a major metropolitan area?

Mr. BREEN. I will find out.

Mr. DINGELL. All right. Now, I have got a bunch of small farmers. I want to protect them. They have animal feeding operations that—and I want to try and figure out what amount of hogs, or size of herd or flock, would trigger the reporting requirements for ammonia and hydrogen-sulfide of 100 pounds per day.

Mr. BREEN. Actually, that is one of the things we don't know, and we hope that the science will help develop from our Consent Agreement.

Mr. DINGELL. Now, have you—has the Administration provided any guidance to small farmers that have animal feeding operations?

Mr. BREEN. We haven't provided sufficient guidance. I think we can do better.

Mr. DINGELL. When will you get around to that?

Mr. BREEN. We are going to start by finding out what State and local governments need, and looking for areas we can make the burden less in reporting and see how far that takes us and go from there.

Mr. DINGELL. Well, maybe you can help me with this question. Do you believe any small farm operations, as opposed to industrial-sized CAFOs, would actually trigger the reporting requirements for ammonia and hydrogen-sulfide?

Mr. BREEN. I am going to just have to let each set of facts stand on its own. What is small? What is large? I just couldn't answer.

Mr. DINGELL. Is there anybody in the room that you could turn to who might help you with that?

Mr. BREEN. I don't think so. I think a lot would depend on facts that we don't have.

Mr. DINGELL. Well, Mr. Chairman, I am going to yield you back 8 seconds.

Mr. DEAL. I thank the gentleman for his generosity. Mr. Gillmor was expected back but is not here, so Mr. Breen, thank you so much for your testimony and appearance here today, and I will call the second panel to the table, if they would come forward. Mr. Hall, did you want to question Mr. Breen?

Mr. HALL. No.

Mr. DEAL. Okay. Thank you. Thank you, ladies and gentlemen, for being here. I will introduce the panel, a very distinguished group, I might add. And thank you all for your time in being here. Ms. Kelly Hunter Burch, who is the Assistant Attorney General of the State of Oklahoma; Mr. Wiley Stem III, Assistant City Manager of the city of Waco, Texas; Mr. Steven Kouplen, President of the Oklahoma Farm Bureau, and here on behalf, I believe, of the American Farm Bureau Federation; Mr. Robert T. Connery, who is a partner in Holland and Hart, and also is appearing here on behalf of the National Cattlemen's Beef Association; Mr. John Starkey, who is Vice President of Environmental Programs of U.S. Poultry and Egg Association; and Dr. Leon D. Weaver, Managing Member of Bridgeport Dairy, and is appearing on behalf of Continental Dairy Products, Incorporated, and Select Milk Producers, Incorporated; Dr. Robert Lawrence, Associate Dean for Professional Practice and Programs at Johns Hopkins Bloomberg School of Public Health; and Ms. Michele Merkel, Senior Counsel of the Environmental Integrity Project.

And, ladies and gentlemen, each of you will be recognized for 5 minutes. Your statements that are prepared in advance are already a part of our records, so recognizing that 5 minutes is not a very long time to talk, I would ask if you would try to summarize that. Ms. Burch, we will start with you.

STATEMENTS OF KELLY HUNTER BURCH, CHIEF OF ENVIRONMENTAL PROTECTION UNIT AND ASSISTANT ATTORNEY GENERAL, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL; WILEY STERN III, ASSISTANT CITY MANAGER, CITY OF WACO; STEVEN KOUPLEN, PRESIDENT, OKLAHOMA FARM BUREAU; ROBERT T. CONNERY, PARTNER, HOLLAND AND HART, ON BEHALF OF NATIONAL CATTLEMEN'S BEEF ASSOCIATION; JOHN STARKEY, VICE PRESIDENT, ENVIRONMENTAL PROGRAMS, U.S. POULTRY AND EGG ASSOCIATION; LEON D. WEAVER, MANAGING MEMBER, BRIDGEWATER DAIRY, MANAGING PARTNER, BRIDGEWATER FARMING, ON BEHALF OF CONTINENTAL DAIRY PRODUCTS, INC., AND SELECT MILK PRODUCERS, INC.; ROBERT S. LAWRENCE, ASSOCIATE DEAN FOR PROFESSIONAL PRACTICE AND PROGRAMS, AND EDITH SCHOENRICH, PROFESSOR OF PREVENTIVE MEDICINE, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH POLICY; AND MICHELE M. MERKEL, SENIOR COUNSEL, ENVIRONMENTAL INTEGRITY PROJECT

Ms. BURCH. Thank you. Thank you for allowing me to be here with you today. The issue that I think—are of great importance to the State of Oklahoma, we are currently dealing with widespread pollution caused by the improper waste disposal practices of industrial-scale poultry operations. The impacts of these practices are seen across roughly the eastern third of our State.

One of the areas most impacted by the release of hazardous substances is the Illinois River and Lake Tenkiller Watershed. This watershed also happens to be one of the most highly valued and protected watersheds in the State. The Illinois River Watershed has historically been noted for its great beauty, its clear high-quality water, and its ecological diversity. Early travelers to the area called it one of the prettiest rivers on the continent. The State has designated the Illinois River and its tributaries as State scenic rivers, and Lake Tenkiller has been referred to as the Emerald Jewel in Oklahoma's Crown of Lakes. As a result, tourism has been a major part of the region's economy, and the watershed serves as a valuable source of drinking water for 22 public water supplies.

This watershed is divided almost equally between Arkansas and Oklahoma. The Arkansas side is the center of Arkansas' poultry industry, which ranks second in broiler production in the United States. As of 2002, confined poultry feeding operations in the Illinois River Watershed were estimated to produce an amount of phosphorous equivalent to the waste of 10.7 million people. This waste, in addition to phosphorous, includes nitrogen, arsenic, zinc, copper, hormones, antibiotics, and a myriad of pathogens. Phosphorous, arsenic, zinc and copper are designated hazardous substances under CERCLA.

This waste is typically improperly stored and disposed of on lands within the watersheds, far in excess of any legitimate crop need or the capacity of the soil to retain them. The constituents of the waste have been released into the surface water, the groundwater, and the sediments of the Illinois River. The result has been widespread and well-recognized pollution of an entire watershed.

The State first began negotiations to put an end to these practices with the poultry industry in November of 2001. In the years that followed, the State worked hard to avoid litigation, and employed every conceivable method for resolution, from informal negotiations with the assistance of EPA Region 6 and the Arkansas Attorney General, to formal mediation with a formal Federal—with a former Federal judge. All of these efforts failed to bring resolution.

In June of this year, the State was forced to file litigation against responsible companies in Federal court. The litigation was filed under Section 107 of CERCLA as well as other State and Federal laws. The case was filed on behalf of the State of Oklahoma and the Oklahoma Secretary of Environment. The goal of the litigation is to stop the improper disposal and clean up the watershed.

It is also important to note that the litigation is directed at the responsible companies, and it is not directed at any individual farmers upon who the companies often place the burden of waste disposal. As you can imagine, Oklahoma is strongly opposed to the proposal to exempt releases of hazardous substances by the poultry industry from CERCLA. CERCLA is a long-standing, important Federal law that provides a mechanism for states to protect their citizens and their environment from the dangers of hazardous substances.

Make no mistake, such an exemption is asking—would be a substantial change in the Law. There is no animal agriculture industry exemption in CERCLA, nor is such an exemption justified. It is important to understand that the pollution caused by industrial animal agriculture is well-documented, serious, and of a Nationwide scope. In fact, the EPA has reported that the agriculture sector is the leading contributor of pollutants to the Nation's lake and rivers.

The animal—the industrial animal feeding operations are not the family farm. We are talking about a multi-billion dollar industry that produces an enormous volume of waste. In 2003, it was estimated that animal feeding operations generated more than 500 million tons of waste. Approximately three times more raw waste than is generated by humans. The overwhelming majority of these operations are not regulated under the Clean Water Act, and they are not adequately regulated in Arkansas.

In addition, the hazardous substances found in poultry waste are not naturally occurring. There in the waste is the direct result of the industry's addition of phosphorous, arsenic, copper and zinc to poultry feed. While CERCLA exempts the normal application of fertilizer, it does not exempt widespread surface disposal, nor the resulting releases of hazardous substances.

In conclusion, the release of hazardous substances from the poultry industry's waste disposal practices is a serious problem across the United States. CERCLA provides an important mechanism for the states to respond to the problem and hold the companies responsible rather than using taxpayer funds to clean up the industry's pollution. The poultry industry should be subject to the same laws that apply to other industries in the country. Hazardous substance disposal and the resulting pollution should not be condoned by the creation of an exemption for the industry in Federal law. Thank you again for the opportunity to present our views on this issue to you.

[The prepared statement of Kelly Hunter Burch follows:]

WRITTEN STATEMENT

of

W. A. Drew Edmondson
Oklahoma Attorney General

through

Kelly Burch
Assistant Attorney General

Before the
HOUSE SUBCOMMITTEE ON ENVIRONMENT
AND HAZARDOUS MATERIALS
HEARING ON SUPERFUND AND ANIMAL AGRICULTURE

November 16, 2005

STATEMENT SUMMARY

Mister Chairman and Members of the Subcommittee, I would like to thank you for allowing me to present my concerns with the proposal to exempt industrial-scale animal agriculture operations from the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. This is an issue of great importance to the State of Oklahoma because we are currently trying to put an end to the pollution in Oklahoma caused by the release of hazardous substances by the poultry industry in several important watersheds that Oklahoma shares with Arkansas, Kansas and Missouri. In the Illinois River watershed, after years of negotiations, the State of Oklahoma filed litigation pursuant to Section 107 of CERCLA, as well as other state and federal laws. I have seen several references to this lawsuit in materials prepared by industry groups in support of an animal agriculture exemption and believe it is critical that I provide you with what I believe to be the true facts surrounding the case and explain its importance to the citizens of the State of Oklahoma.

The Illinois River Watershed and Tenkiller Ferry Lake ("IRW") are natural resources of unparalleled importance to the State of Oklahoma. See Exhibit 1. The IRW is noted for its aesthetic, ecological, recreational, and public water supply values, and the quality of the water is essential to the economy of the region. Water quality is seriously impaired in the region, primarily as a result of the waste disposal practices of a large, concentrated, integrated poultry industry. Accordingly, after years of unsuccessful negotiations with the poultry industry, the State filed litigation to stop the industry's improper waste management practices and restore the Illinois River and Lake Tenkiller.

The poultry companies that are the subject of the suit, as well as their representatives and proxies, have used a number of tactics to attempt to avoid responsibility for the pollution of

Oklahoma's and Arkansas' waters. For example, during the 2005 Oklahoma Legislative Session, they sought unsuccessfully to remove my statutory authority to file litigation without the approval of the Governor and the Legislature. See Okla. H.B. 1879 (2005). Currently, they are in District Court challenging the Oklahoma Department of Agriculture, Food and Forestry's right to inspect and sample their poultry operations in Oklahoma. See Josh J. Reed, et al. v. State of Oklahoma, Case No. CJ-2001-498 (Okla. 2005). Now it appears that they or their representatives are seeking a complete exemption from Congress from a long-standing, well-established federal environmental law. Apparently, the poultry companies believe that changing or challenging the law is preferable to complying with it.

Despite contrary assertions, exempting animal waste generated by the animal agriculture industry from CERCLA would be a substantial change in the law which would severely limit the States' ability to appropriately respond to releases of hazardous substances and pollution caused by this industry. Accordingly, I urge you to oppose this effort and support the States' ability to protect their citizens and environment from the impacts of pollution caused by the poultry industry.

I. Application of CERCLA to the Agricultural Industry and its Importance to the States

On October 26, 2005, the Oklahoma Office of Attorney General wrote to certain members of Congress regarding a proposed rider to the fiscal year 2006 agricultural appropriations bill that would have exempted animal waste generated by agricultural operations from CERCLA. Specifically, the proposal would have exempted "animal manures" from the definition of "hazardous substances" under Section 101(14) of the Act and excluded the term "manure" from the definition of "pollutant or contaminant" under Section 101(33) of the Act. See Exhibit 2. The letter asked the recipients to oppose the amendment because of the "serious impact this action will have on the

State's ability to protect its citizens and natural resources from the effects of hazardous substances released into the environment by large-scale, corporate agriculture operations." Id.

This rider was not included in the agriculture appropriations bill for fiscal year 2006 that was approved by Senate and House conferees on October 26, 2005. However, to the extent that the Subcommittee is reviewing this proposal, it is important to consider the adverse impacts of exempting animal waste generated by the animal agriculture industry from CERCLA on the States' ability to protect their citizens and the environment.

Amending CERCLA to exclude "animal manure" will severely limit the States' ability to respond to the release of hazardous substances by the animal agriculture industry because the States would no longer be able to recover their response costs or seek damages to restore natural resources under Section 107 of the Act. As described below, the release of hazardous substances from this industry is a serious problem across the nation. CERCLA provides a mechanism for the States to respond to the problem and hold the companies responsible, rather than using taxpayer funds to clean up the industry's pollution.

The animal agriculture industry should be held responsible for the release of hazardous substances, such as arsenic and phosphorus, to the same extent that every other industry is held responsible. CERCLA already provides an exemption for the normal application of fertilizer, *see* 42 U.S.C. § 9601(22), but it does not provide an exemption for massive disposal of animal waste far in excess of crop needs and the resulting releases of hazardous substances. Further, the majority of animal feeding operations are not subject to the permitting requirements of the Clean Water Act and, thus, are not adequately addressed by other federal laws.

Despite representations to the contrary, the animal agriculture industry is not currently exempt from liability under CERCLA. A serious and substantial change to an important federal law is being proposed. It simply is not a clarification of existing law. If the proponents of such an amendment truly believed that CERCLA already provided such an exemption, clearly there would be no need to amend CERCLA. The Courts are capable of interpreting federal law and determining Congressional intent and numerous legal mechanisms exist for the industry to challenge any decision that it believes misinterprets the law.

A. Pollution from Animal Feeding Operations is a Nationwide Problem

The proponents of this proposed exemption assert that the animal agriculture industry only releases "diffuse, low-level" substances to the environment which are adequately addressed under other federal and state laws. However, according to the the 1998 National Water Quality Inventory Report, "the agricultural sector contributes to the impairment of at least 170,000 river miles, 2.4 million lake acres, and almost 2,000 estuarine square miles." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg 2960-01, 2973 (2001). Further, according to the 2000 National Water Quality Inventory Report, the agricultural sector, including Concentrated Animal Feeding Operations ("CAFO"), is the leading contributor of pollutants "to identified water quality impairments in the nation's rivers and streams, lakes, ponds, and reservoirs." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed Reg.7176-01, 7237 (2003); See also 66 Fed. Reg. at 2973, 2976-77.

The EPA also reports that twenty-nine (29) States have specifically identified animal feeding operations as contributors to water quality impairment. See 68 Fed. Reg. at 7237. In the CAFO rule making documents, the EPA noted numerous studies indicating that the facilities are significant contributors of pollutants to water across the country and noted numerous reports of discharges resulting in fish kills and other environmental impacts. See generally 68 Fed. Reg. at 7237.

Although States report that nonpoint source pollution is the leading remaining cause of water pollution in the United States, the majority of the estimated 238,000 animal feeding operations in the United States are not currently regulated by the EPA under the Clean Water Act. As of 2001, the EPA estimated that, of the 12,000 animal feeding operations that were subject to the CAFO point source permitting requirements, only 2,530 had actually applied for permits. See 66 Fed. Reg. at 2963. Further, the CAFO permit is primarily directed at preventing the pollution caused by nutrients, as opposed to the other constituents of animal waste such as metals and pathogens. See, e.g., 40 C.F.R. 412.4.

In Oklahoma and Arkansas, the majority of the large-scale poultry operations contributing to pollution of Oklahoma's natural resources are not regulated under the Clean Water Act. As of 2002, the estimated total company-owned or contract poultry houses located within the IRW included approximately 2,363 houses in Arkansas and 508 houses in Oklahoma. See Exhibit 3. The overwhelming majority of these poultry operations are not CAFOs and are thus not regulated under the federal Clean Water Act. See Exhibit 4.

Additionally, the overwhelming majority of these poultry operations are located outside the boundaries of Oklahoma and are beyond the regulatory authority of the Oklahoma Department of Agriculture, Food and Forestry. Although the Arkansas Legislature passed legislation governing poultry operations in 2003, the deadline for obtaining even a nutrient or poultry litter management plan has been extended until January 1, 2007. See Ark. Code Ann. § 15-20-1106. Thus, the majority of the Arkansas poultry operations releasing hazardous substances into Oklahoma's waters are not regulated by either the EPA or the agricultural agencies in Oklahoma or Arkansas. Clearly, CERCLA provides an important mechanism for the State of Oklahoma to respond to this interstate problem.

B. Constituents of Poultry Waste and the Naturally Occurring Substance Provision

The proponents of this exemption characterize the waste generated by this industry as "naturally occurring organic substances" that only include ammonia, hydrogen sulfide and phosphorus, as opposed to dangerous, synthetic chemicals The description of animal waste as a "naturally occurring organic substance" mischaracterizes both the nature of the waste and the process by which it is generated at large-scale, concentrated agricultural operations. It is also an attempt to downplay the public health threats and environmental problems that are presented by the poultry industry's management of its waste.

The "naturally occurring substance" exemption is contained in Section 104(a)(3) of CERCLA. In general, the EPA cannot undertake a removal or remedial action under Section 104 of CERCLA for the release of a "naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. §9604(a)(3) [Emphasis added]. This provision was enacted to address situations where releases of hazardous substances and the resulting pollution are not caused by the activities of man.

In considering this issue, it is important to understand that the waste produced by today's animal feeding operation is substantially different than the waste produced by the family farmer in the past. It is not "naturally occurring" and it is not composed of only ammonia, phosphorus and hydrogen sulfide. According to the United States Environmental Protection Agency, the primary pollutants most commonly associated with animal waste are phosphorus, nitrogen, ammonia, organic matter, solids, pathogens, odorous compounds, trace metals, pesticides, antibiotics, and hormones. 68 Fed. Reg at 7181. Trace elements in manure that are of environmental concern include "arsenic, copper, selenium, zinc, cadmium, molybdenum, nickel, lead, iron, manganese, aluminum, and boron." 66 Fed. Reg. 2978.

In order to achieve the growth rates which make it possible for a single poultry house to raise 5.5 flocks in a year, broiler feed has been carefully engineered. Arsenic, copper, selenium, and zinc have all been added to the feed to promote growth and inhibit parasites. Id. at 2985. As a result, the waste which comes out of the birds and goes into the waste stream coming out of these poultry houses is laden with these metals. A recent U.S. EPA National Exposure Research Laboratory report states that:

> Organic arsenic compounds are extensively added to the feed of animals (particularly poultry and swine) in the United States to improve growth rates by controlling parasitic diseases. **The resulting arsenic-bearing wastes are currently introduced to the environment, and even used to fertilize croplands**. Most of the roxarsone appears to be excreted unchanged. Litter (bedding material.. and excrement) of broilers fed roxarsone-treated feed contains 15-30 ppm arsenic. If most of these chickens were fed feed containing roxarsone at the 45.4 g/ton rate, for 1999 alone, there was a potential for more than 300,000 kg of total arsenic to enter the environment through application of litter of roxarsone treated broilers to agricultural land. **The environmental impact may be substantial in geographic regions where the application of arsenic-contaminated litter is concentrated**.

Momplaisir, G.M; C.G. Rosal; E.M. Heithmar, Arsenic Speciation Methods for Studying the Environmental Fate of Organoarsenic Animal-Feed Additives, U.S. EPA, NERL-Las Vegas, 2001; (TIM No. 01-11) [Emphasis added].

Many of the above mentioned pollutants have the potential to affect human health and the environment. Excess phosphorus and nitrogen can cause eutrophication which affects "the dissolved oxygen content of a water body to levels insufficient to support fish and invertebrates." 66 Fed. Reg. at 2982. Eutrophication can also cause the growth of toxic organisms such as cyanobacteria and Pfisteria piscida which can be harmful to both humans and wildlife. Id. at 2981. Eutrophication also has the potential to cause drinking water impacts by "clogging treatment plant intakes, producing objectionable tastes and odors, and increasing production of harmful chlorinated byproducts (e.g., trihalomethanes) by reacting with chlorine used to disinfect drinking water." Id. At 2982. Trace metals can also pose a threat to human health and the environment. For example, arsenic is carcinogenic to humans, selenium is associated with liver dysfunction and loss of hair and nails, and zinc can result in changes in copper and iron balances, particularly copper deficiency anemia. Id. at 2984.

Clearly, animal manure produced at animal feeding operations is not a "naturally occurring substance." **The constituents of the waste are a direct function of the feed supplements provided to the animals by the companies**. Further, the release of hazardous substances into the environment from the disposal of this waste is not a natural occurrence. It is a result of the companies' practice of disposing of the waste on the ground in a manner that is not sufficient to prevent the release. Accordingly, the "naturally occurring substances" provision in CERCLA does not apply to animal waste from animal feeding operations and it is not indicative of any congressional intent to exclude releases of hazardous substances in this waste from the Act.

C. Industry Waste Disposal Practices

In considering this proposed exemption, it is also important to recognize that we are not discussing the impact of the family farm on the environment. We are talking about the pollution caused by the disposal practices of modern, large-scale integrated agricultural operations. These integrated operations differ radically from the family farm. The scale of such integrated operations today dwarf these historic enterprises and bring with them environmental problems of equal proportion.

According to the EPA, as of 2003, there were 238,000 "animal feeding operations" in the United States which generated approximately 500 million tons of waste each year, **three times more raw waste than is generated yearly by all the humans in the United States**. 68 Fed. Reg. at 7179-80. In 1934, the United States produced an estimated 34 million broilers. USDA, Economics, Statistics, and Market Information System, usda.mannlib.cornell.edu (2005). Roughly fifty years later, it is estimated that over 5 billion were produced and, over the next five years, over 8 billion were produced. Id.

In the first half of the twentieth century a farm might have a chicken coop or brooder house that might hold 500 chickens, a large one might hold 1,400 birds. Early Poultry Houses, Iowa Barn Foundation, http://iowabarnfoundation.org/magazine/early_poultry_houses.htm. A "smaller" modern poultry house can house a 25,000 bird flock at a time producing an average of 5.5 flocks per year and 125 tons of poultry waste. Nutrient Analysis of Poultry Litter and Possible Disposal Alternatives, Avian Advice, University of Arkansas, Fall 2003, Vol. 5, No. 3, p. 1.

In Eastern Oklahoma and Northwest Arkansas, each poultry operation will generally have more than one house. See e.g; Exhibits 5, 6, 7, and 8. The industry average is 2.3 houses per operator and some of these operations have four or more houses at one location. Holleman, John T., In Arkansas Which Comes First, The Chicken or the Environment, Tulane Environmental L. R., Vol. 6, p. 21, 26. The EPA has found that the trend for "animal feeding operations" has been "toward fewer but larger operations" resulting in concentration of "more manure nutrients and other waste constituents within some geographic areas. These large operations often do not have sufficient land to effectively use the manure as fertilizer." See 68 Fed. Reg. at 7180.

EPA has further noted the concentration has resulted in "widespread phosphorus saturation of the soils" in some areas of the United States and that "research shows a high correlation between areas with impaired lakes, streams and rivers due to nutrient enrichment and areas where there is dense livestock and poultry production." 68 Fed. Reg. at 7196. The USDA has estimated that confined poultry operations "account for the majority of on-farm excess nitrogen and phosphorus . . ." because of the generally higher nutrient composition of poultry waste and the lack of land available for application. See 68 Fed Reg. at 7180.

In the United States, in 1997, 165 counties had the potential for excess manure nitrogen and 374 counties had the potential for excess manure phosphorus primarily because of the lack of available land application areas. 68 Fed. Reg. at 7180-81. In 1999, the USDA speaking about the build up of phosphorus in soils where the waste from concentrated animal operations were disposed of, warned:

> Phosphorus accumulation on farms has built up soil P to levels that often exceed crop needs. Today there are serious concerns that agricultural runoff (surface and subsurface) and erosion from high P soils may be major contributing factors to surface water eutrophication. . . . **By the time these water-quality impacts are manifest, remedial strategies are difficult and expensive to implement; they cross political and regional boundaries; and because of P loading, improvement in water quality will take a long time**.

Agricultural Phosphorus and Eutrophication, USDA, ARS 146, July 1999, p. 4 [Emphasis added]. As part of any discussion of reducing federal environmental protections, it is important to recognize that poultry industry expansions are frequently occurring along state borders. See Exhibit 9. For example, as in many areas across the United States, there is major expansion going on along the borders of Oklahoma, Arkansas and Missouri. Id.

The family farm with its hundreds of birds had plenty of uses for the manure the birds produced. With a single poultry house producing 125 tons of manure every year, the industry is running out of safe places to dispose of its waste. Most recently, the University of Arkansas Extension Service, explained the problem:

> **The Arkansas poultry industry generates 1.4 million tons of broiler litter annually**. While litter is still a valuable fertilizer resource that is needed in many areas, litter generated in poultry producing regions cannot be properly utilized in those regions alone. **By some estimates, alternative uses for perhaps as much as half of the litter generated in concentrated production areas must be found**.

Nutrient Analysis of Poultry Litter and Possible Disposal Alternatives, *supra* at 4 [Emphasis added].

In 2003, the Arkansas Legislature designated the majority of the watersheds bordering Oklahoma as Nutrient Surplus Watersheds, which are defined as an area "which has been determined to be an area in which the soil concentration of one (1) or more nutrients is so high or the physical characteristics of the soil or area are such that continued application of the nutrient to the soil could negatively impact soil fertility and the waters within the state." Ark. Code Ann. § 15-20-1103 and 1104; See Exhibit 10. Further, as a result of the massive amount of phosphorus produced in this area and the fact that the area is highly conducive to loss of phosphorus runoff, the United States Department of Agriculture identified these Oklahoma watersheds as potential priority water resources for protection of water quality from animal manure. See Exhibit 11. The Arkansas River subregion, which includes the Illinois River, is given the second highest priority in the United States based on the need to address pollution from animal wastes. Id.

The poultry waste generated in Arkansas and Oklahoma is being disposed of on lands far in excess of agronomic crop requirements and soil capacity, and is being applied in a manner that releases hazardous substances into the soils, surface water and groundwater. There is already an exemption for animal feeding operations that are engaging in the normal application of fertilizer in Section 9601(22) of CERCLA. However, the exemption does not apply to waste disposal in excess of agronomic crop requirements and soil capacity, nor does it exempt the release of hazardous substances from such activities.

The meaning of this provision is illuminated in the Senate Report for the CERCLA legislation as follows:

> Certain feedstocks used to produce fertilizer (nitric acid, sulfuric acid, phosphoric acid, anhydrous ammonia) are hazardous substances as defined by the bill, and certain fertilizer products may be listed as hazardous substances as well. . . . Under this exclusion, however, the "normal field application" of fertilizer is not a "release" as defined in the bill. . . . The term "normal field application" means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.

S. Rep. No. 96-848, at 46 (1980) [Emphasis added]. In passing the CERCLA legislation, the Senate bill was adopted by the House without amendment, and when this happens, "the Senate report is powerful evidence of congressional intent." State of Colorado v. United States Department of Interior, 880 F.2d 481, 487 (D.C. Cir. 1989).

The current "normal application of fertilizer" provision of CERCLA is adequate to protect all legitimate agricultural interests. This provision does not indicate congressional intent to completely exempt animal manure and associated releases of hazardous substances from CERCLA.

II. **Protection of the State's Scenic Rivers**

The IRW consists of 1,069,530 acres of land that straddles the Arkansas-Oklahoma border and approximately 576,030 acres of the IRW lies within the boundaries of Oklahoma. In 1970, the

Oklahoma Legislature designated the Illinois River and portions of its tributary rivers, Baron Fork Creek and Flint Creek, as "State Scenic River Areas." 82 Okla.Stat. § 1452 (1970). The designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers and streams "possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma." Id. The early travelers described the Illinois as an exceptional river:

> The principal streams that irrigate the country are the Arkansas, the Grand or Neosho River, the Verdigris, coming down from the north and emptying into the Arkansas at Fort Gibson. **On the east side of the Arkansas is the Illinois River, rising in the mountainous regions southeast of Fort Gibson, said to be one of the prettiest rivers on the continent, sparkling with crystal waters**.

Reports of the Board of Indian Commissioners. Appendix 37. Second Annual Report 1870 (Fort Gibson, Indian Territory, December 16, 1870), *reprinted in* Chronicles of Oklahoma Vol. 5, No. 1 (March 27) at 80 [Emphasis added].

These rivers are also designated, in Oklahoma's federally approved water quality standards, as "outstanding resource waters" for protection of their beneficial uses such as aesthetics, recreation, public water supply, and fish and wildlife propagation. See Okla. Admin. Code 785:45-3-2. Tourism has been especially important to the region's economy because the Illinois River is a noted recreational destination for floating, fishing, camping, swimming, diving, hiking, and sightseeing. In addition, the IRW also serves an important source of drinking water to Oklahoma citizens. In all, there are twenty-two (22) public water supply systems which depend on the IRW for clean water.

The Illinois River feeds into the 12,900 acre Tenkiller Ferry Lake, which has been described as the emerald jewel in Oklahoma's crown of lakes. Like the river from which it is formed, before it began to deteriorate, Tenkiller was known for its pristine waters:

> Tenkiller is Oklahoma's most beautiful lake. . . . For a distance of more than 30 miles above the dam near Gore that holds back its deep, crystal clear waters, it stretches in a northeasterly direction through the fabled and picturesque Cookson Hills.

C. Brill, 1957 Brill's Oklahoma Outdoor Guide at 169 (Oklahoma City Consolidated Publishing Company). Lake Tenkiller serves as a valuable source of drinking water, and currently, the primary recreational activities at Lake Tenkiller include boating, fishing, camping, swimming, and sightseeing. As of 1974, the direct benefit of recreation at Lake Tenkiller to the regional economy was estimated at $31.8 million/year. Badger. D. Daniel, Dean F. Schreiner, and Ronald W. Presley, Regional Impacts of Recreational Expenditures at Two Oklahoma Lakes, Proc. Okla. Acad. Sci. 56:139-142 (1976).

A. Poultry Integrator Company Operations in the Illinois River Watershed

In this river valley are some of the most concentrated poultry growing operations in the entire country. It is the home of Tyson Foods and several other smaller poultry integrators. Arkansas is ranked second in broiler production in the United States and Washington and Benton Counties through which the Illinois River and its major tributaries flow form the center of this industry in Arkansas[1]. As of 2002, there were an estimated 2,871 poultry houses in the IRW. Exhibit 3. **The estimated phosphorus in the waste produced by poultry in the Illinois River Watershed is the equivalent to the waste stream of 10.7 million people**. Id. That is more people than live in all of Arkansas, Kansas and Oklahoma combined.

In the IRW, the poultry companies own millions of chickens and turkeys that generate hundreds of thousands of tons of waste. The constituents of the poultry waste include, but are not limited to, phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. Phosphorus, arsenic, zinc, and copper are designated hazardous substances under CERCLA. 40 C.F.R. § 302.4 Photographs of the industry's waste disposal practices are included in Exhibits 12 and 13. Generally, this waste has been improperly stored in large piles that are not isolated from the elements and disposed of on lands within the IRW in excess of crop agronomic needs and soil capacity. These practices are causing an accumulation of hazardous substances, pollutants and contaminants in the soils and are causing runoff and release of large quantities of phosphorus and other waste constituents into the waters of the IRW.

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[1] www.ers.usda.gov/Briefing/Poultry/background.htm; Holleman, John T., In Arkansas Which Comes First, The Chicken or the Environment, Tulane Environmental L. R., Vol. 6, p. 26.

B. Effects of Poultry Integrator Companies on the Illinois River Watershed

The IRW is "highly susceptible" to pollution from land application of animal waste because of "the fractured and dissolved carbonated terrain (karst) of northwest Arkansas." Graening, G.O., Brown, A.V. 2000, Trophic Dynamics and Pollution Effects in Cave Springs Cave, Arkansas: A final report submitted to the Arkansas Natural Heritage Commission. Arkansas Water Resources Center Publication No. MSC-285. p. 44. The lands and waters of the IRW contain elevated levels of a number of the constituents of animal waste and the resulting injury to natural resources is caused by the poultry companies' improper waste disposal practices.

The dangers to water quality caused by land disposal of poultry waste in the IRW, are succinctly summarized as follows:

> From a geologic standpoint, the center of the poultry industry could not be placed in a worse area. These two counties [Benton and Washington] are located in the Ozark Highlands region of the state. This area is noted for its mountainous terrain with steep gradients and fast-flowing, spring fed streams. A large percentage of the streams from within this region are designated as extraordinary resource waters. The

> fractured limestone geology of the region allows a direct linkage from surface waters to groundwaters.

Holleman, John T., In Arkansas Which Comes First, The Chicken or the Environment, Tulane Environmental L. R., Vol. 6, p. 26.

As a result of the waste disposal practices of the poultry industry, this once pristine watershed is seriously impaired. See, e.g. Exhibit 14. For example, bacteria, nutrients and metals are reported to chronically exceed background levels in groundwater in the IRW. Graening, G.O., Brown, A.V. 2001, Protection of Cave Springs Cave Biota and Groundwater Basin, Arkansas Water Resources Center Publication No. MSC-297. p. 1. In addition, the surface water impacts caused by the phosphorus released from the poultry industry's operations are well known and well documented in both government reports and peer reviewed literature. Releases of phosphorus have caused violations of state water quality standards, periodic algae blooms, excessive algal growths, hypolimnetic anoxia and other adverse impacts in the waters of the IRW, resulting in eutrophication, a degradation in water quality and sediments, injury to biota and impaired beneficial uses of the water. The Illinois River, Baron Fork Creek and Flint Creek are also all impaired by bacterial contamination and are not meeting the standards for primary body contact recreation. These streams have also been found not to support their use as public or private water supplies.

In spite of the amount of waste produced by the industry in this region; the potency of that waste; the dangers of bacterial or viral diseases being transmitted by the waste from poultry to the human population; and the unsuitable nature of the geology in this region for such practices, the poultry industry continues to dispose of hundreds of thousands of tons of untreated animal waste every year by spreading it onto the ground in the IRW.

C. Requested Relief in Oklahoma v. Tyson

The State of Oklahoma first began discussions with the poultry industry to stop pollution of the State's natural resources by improper animal waste disposal in November of 2001. In the years that followed, Oklahoma attempted a number of settlement mechanisms in order to prevent litigation, including informal negotiations through the Arkansas Attorney General; a joint negotiation with Arkansas and Oklahoma agencies with the assistance of Region VI of the U.S. Environmental Protection Agency, and a formal mediation with the assistance of retired United States District Judge Thomas Brett, assisted by former Region EPA VI Administrator, Gregg Cooke. All of these efforts failed to bring resolution to this problem.

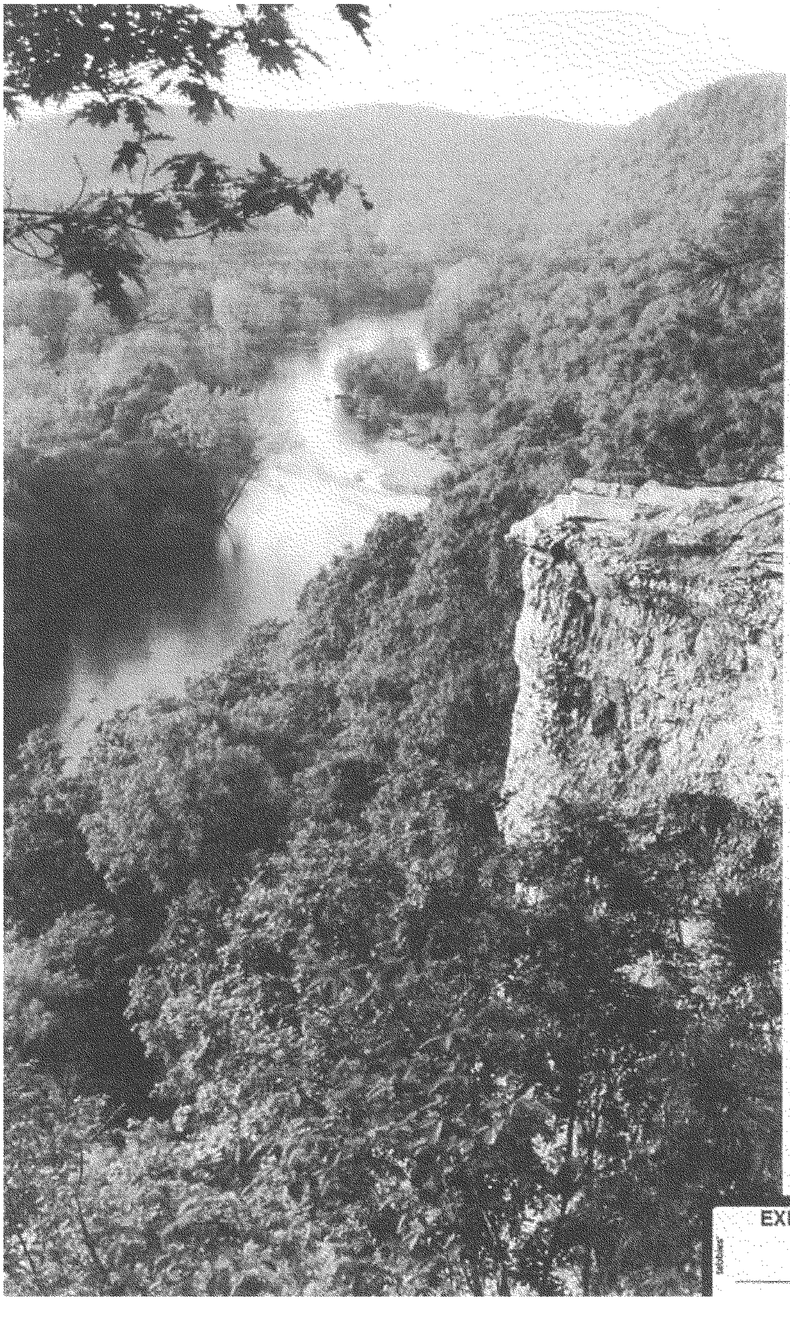
On June 13, 2005, the State of Oklahoma filed a lawsuit against fourteen poultry companies for pollution of the Illinois River Watershed and Tenkiller Ferry Lake (hereinafter "IRW"). The case, State of Oklahoma v. Tyson Foods, Inc., et al., Case No. 4:05-cv-000329-JOE-SAJ, was filed in federal District Court for the Northern District of Oklahoma. The Complaint alleges that the poultry companies are legally responsible for the waste, the improper disposal of the waste and the resulting pollution, damage and injury to natural resources in the IRW. Accordingly, the lawsuit does not name any individual farmers, commonly referred to as "poultry growers" or "poultry producers," with which the poultry companies often contract to raise their birds and manage their waste. Rather, the lawsuit is directed at the actions of the poultry companies who either own or control the poultry operations in the IRW.

The Amended Complaint includes three counts based on federal law, including cost recovery and natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607; an Imminent and Substantial Endangerment action for injunctive relief and other available remedies under the Solid Waste Disposal Act, 42 U.S.C. § 6972 ((a)(1)(B) and (b)(2)(A)); and equitable relief, costs and damages under the federal common law of nuisance. The Complaint also includes state law claims. The State seeks, among other things, abatement, remediation, damages, declaratory relief, costs, penalties, and equitable relief. In sum, the State is seeking to stop the actions of the poultry companies which are causing pollution, clean up the pollution, restore the natural resources that have been injured, and compensate the public for the damages done by the industry's practices.

III. Conclusion

The amendment you are considering is not an effort to protect the family farmer, as is so often claimed by the poultry industry public relations efforts. It is a blatant attempt by a multi-billion dollar industry to protect its practice of dumping waste in an environmentally damaging manner. No other industry in the country has that kind of protection. Since adoption of the federal clean water and air legislation, no other industry has so callously polluted our land and waters.

Normal practices of crop fertilization are already protected. Hazardous substance disposal, far in excess of any crop needs, should not receive the blessing of Congress by adoption of the amendment here proposed. Thank you again for the opportunity to present my views to the Subcommittee on this issue of national importance.



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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

October 26, 2005

The Honorable Henry Bonilla
Chairman
SubCommittee on Agriculture, Rural
Development, Food and Drug Administration
and Related Agencies
United States House of Representatives
2458 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Bonilla:

It has come to my attention that the Senate Conferees yesterday approved a rider proposed by Senators Larry Craig and Sam Brownback to the fiscal year 2006 agricultural appropriations bill that would exempt agricultural operations from the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Specifically, the language would exempt "animal manures" from the definition of "hazardous substances" under Section 101(14) and exclude the term "manure" from the definition of "pollutant or contaminant" under Section 101(33) of CERCLA.

I am writing you to urge that you oppose this amendment because of the serious impact this action will have on the State's ability to protect its citizens and natural resources from the effects of hazardous substances released into the environment by large-scale, corporate agriculture operations. It is of great concern that this language is being considered as a rider to an appropriations bill given the significant ramifications of making this substantive amendment to a longstanding environmental law.

One of the most important issues facing the State of Oklahoma is the continuing degradation and pollution of Oklahoma's lakes, rivers and streams by non-point source pollution. According to the Environmental Protection Agency ("EPA"), the States report that non-point source pollution is the leading remaining cause of water quality problems in the United States. Releases of hazardous substances and pollutants from agricultural operations can seriously impact human health, drinking water supplies, and aquatic life.

In Oklahoma, we are currently trying to remedy the pollution caused by the disposal of enormous volumes of poultry waste in the watersheds of our most important natural resources, including our state Scenic Rivers. Poultry waste can contain many pollutants including phosphorus, nitrogen, arsenic, zinc, copper, hormones, antibiotics,

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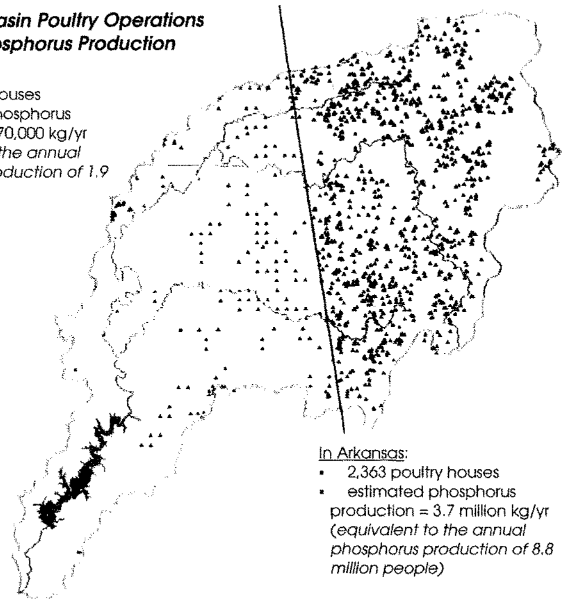
and pathogens which may be released from the disposal areas causing pollution of natural resources.

CERCLA is of extreme importance to the State in remedying pollution and protecting the health of its citizens from releases of hazardous substances from all industries, including the agriculture industry. Exempting the agriculture industry from CERCLA will seriously limit the State's ability to appropriately respond to the human health and environmental problems caused by such releases.

Accordingly, I urge you to vote against amending CERCLA to exempt agricultural operations from the provisions of CERCLA. Thank you for your consideration of this matter.

Sincerely,

W.A. Drew Edmondson
Oklahoma Attorney General



Illinois River Basin Poultry Operations Estimated Phosphorus Production

In Oklahoma:

- 508 poultry houses
- estimated phosphorus production = 770,000 kg/yr *(equivalent to the annual phosphorus production of 1.9 million people)*

In Arkansas:

- 2,363 poultry houses
- estimated phosphorus production = 3.7 million kg/yr *(equivalent to the annual phosphorus production of 8.8 million people)*

From "Illinois River Basin Tour" guide (Oklahoma Water Resources Board; August 12, 2002)

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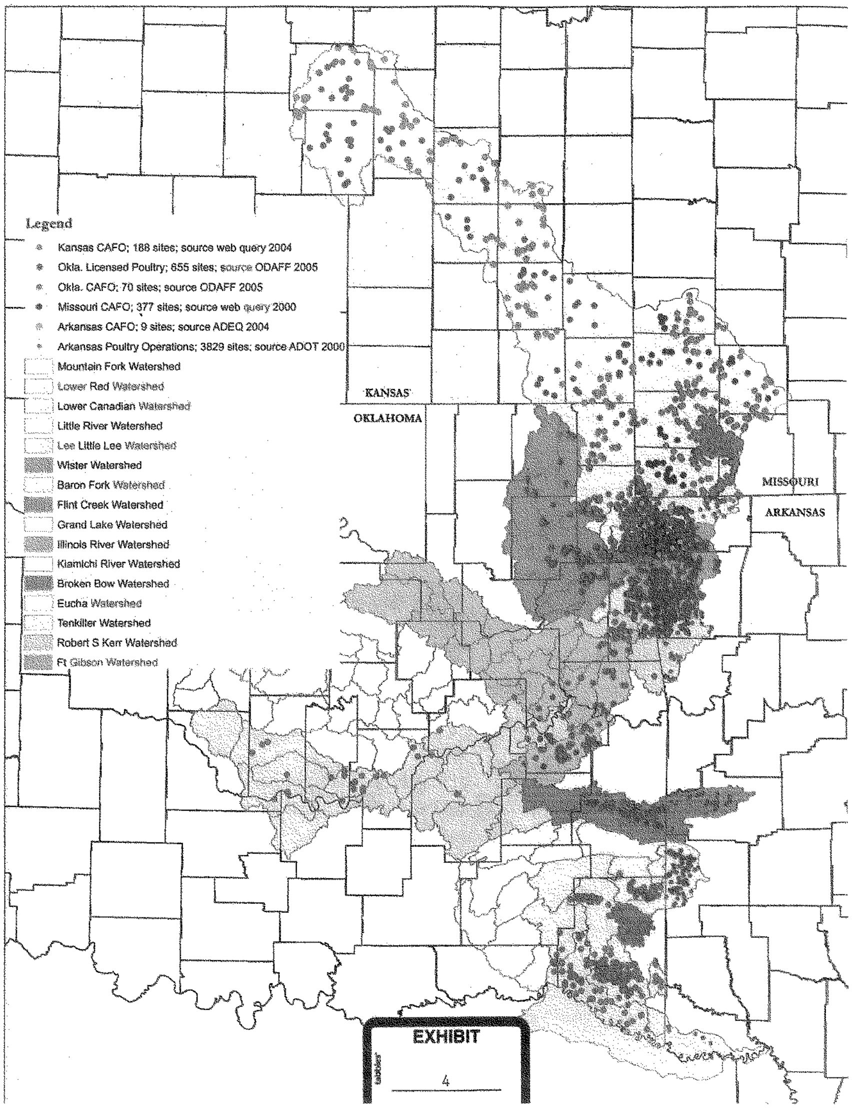
Legend
Kansas CAFO; 188 sites; source web query 2004
Okla. Licensed Poultry; 655 sites; source ODAFF 2005
Okla. CAFO; 70 sites; source ODAFF 2005
Missouri CAFO; 377 sites; source web query 2000
Arkansas CAFO; 9 sites; source ADEQ 2004
Arkansas Poultry Operations; 3829 sites; source ADOT 2000
Mountain Fork Watershed
Lower Red Watershed
Lower Canadian Watershed
Little River Watershed
Lee Little Lee Watershed
Wister Watershed
Baron Fork Watershed
Flint Creek Watershed
Grand Lake Watershed
Illinois River Watershed
Kiamichi River Watershed
Broken Bow Watershed
Eucha Watershed
Tenkiller Watershed
Robert S Kerr Watershed
Ft Gibson Watershed
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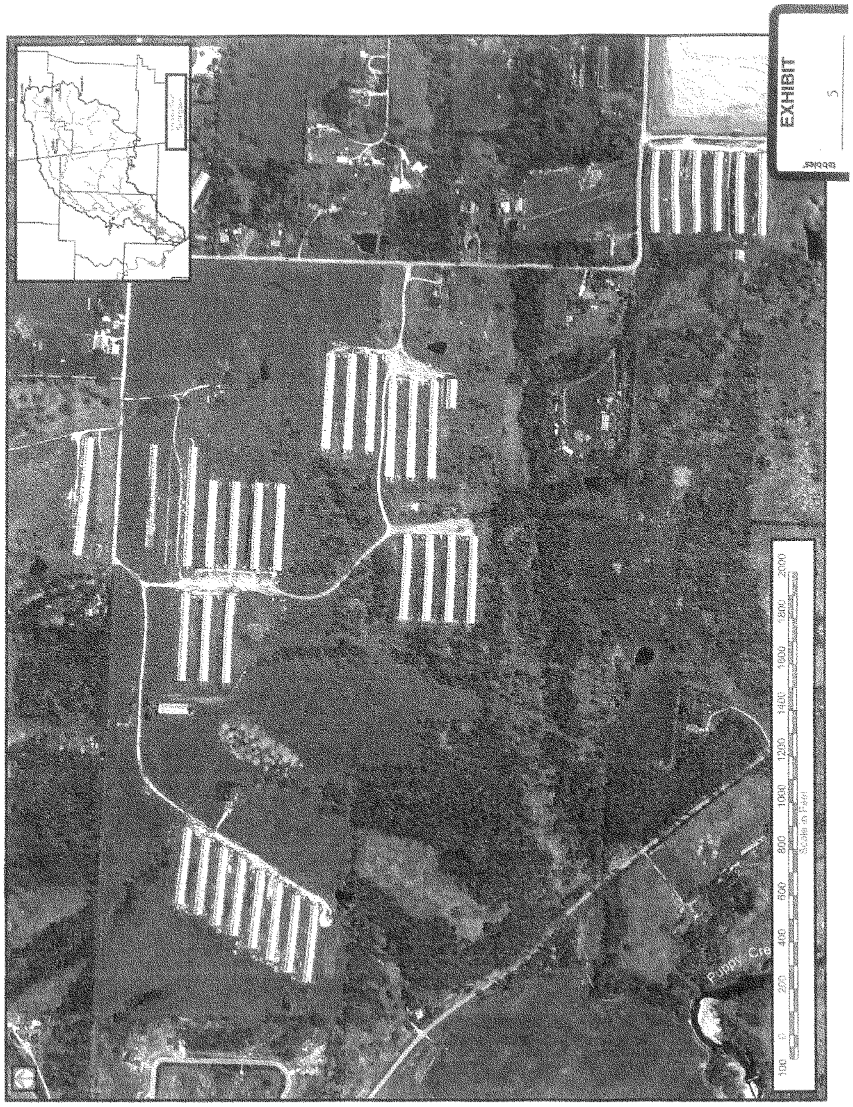

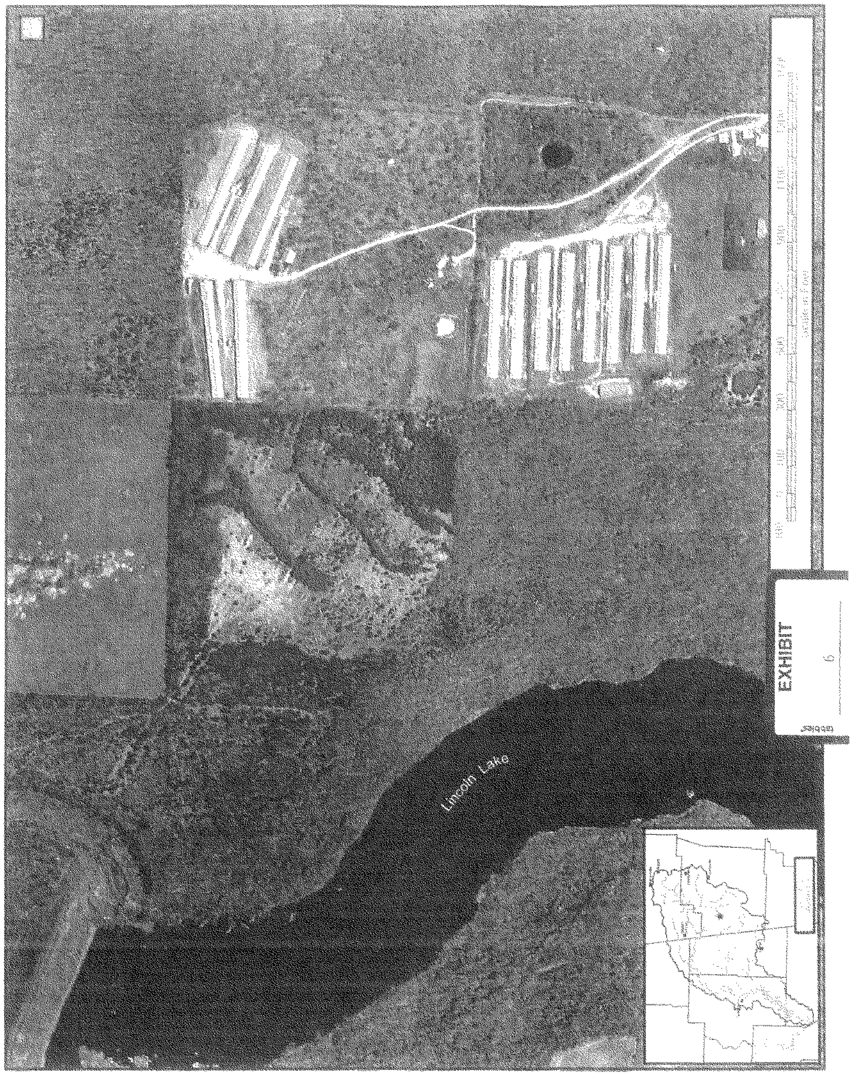

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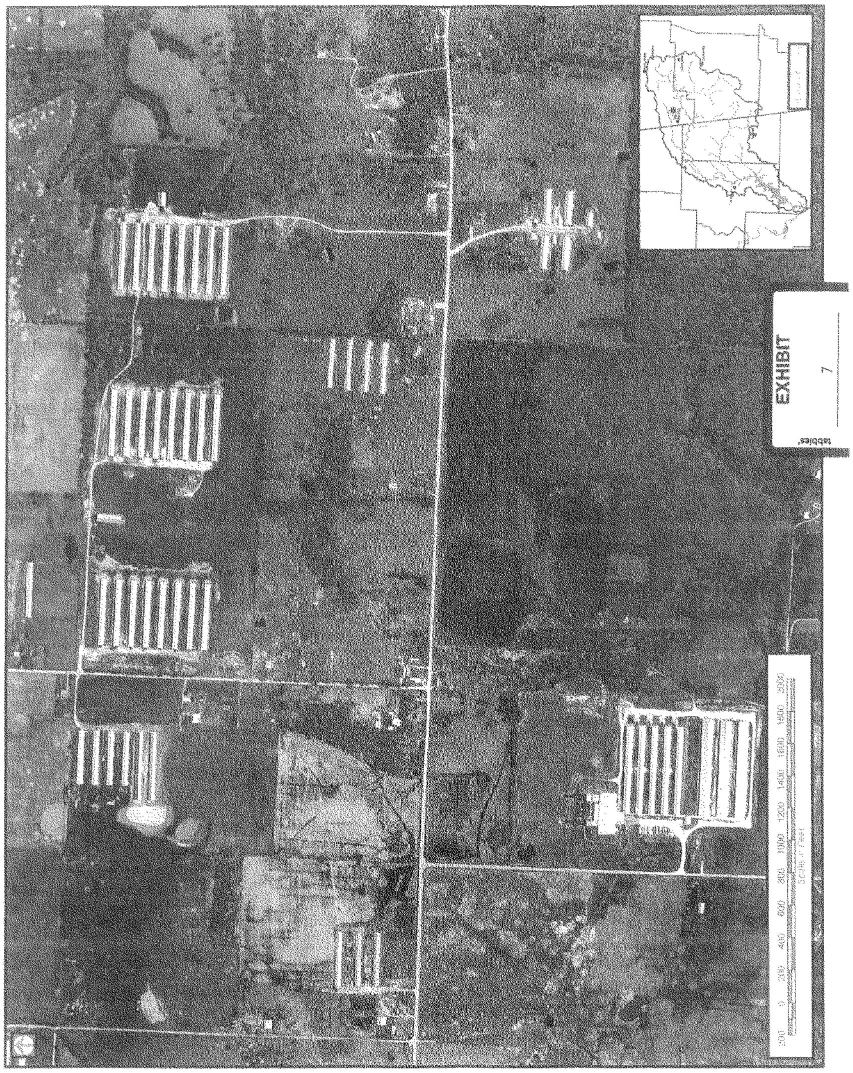
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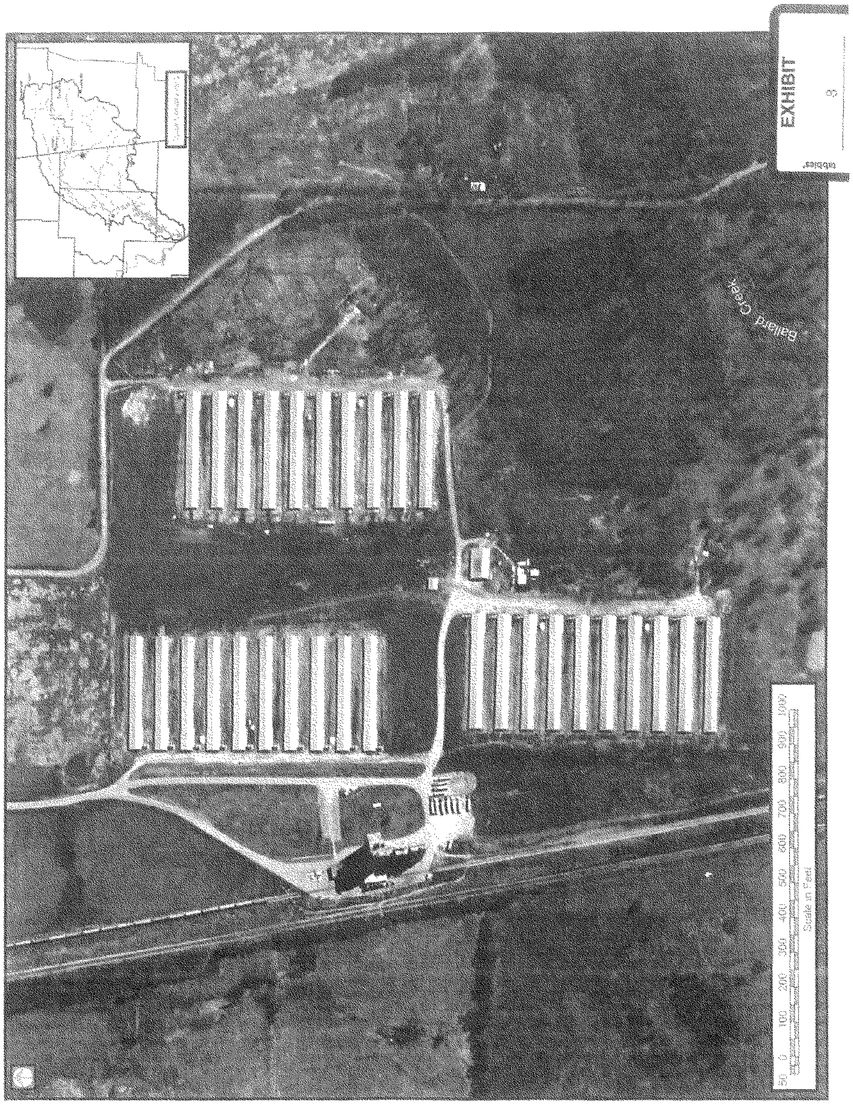

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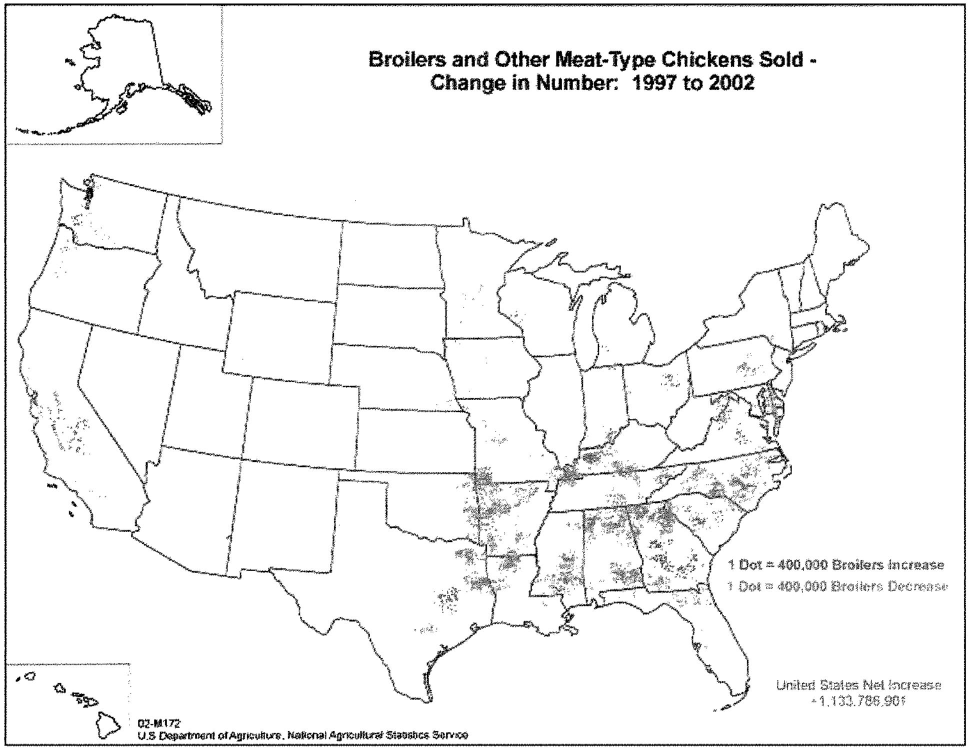

Broilers and Other Meat-Type Chickens Sold - Change in Number: 1997 to 2002

1 Dot = 400,000 Broilers Increase
1 Dot = 400,000 Broilers Decrease
United States Net Increase
+1,133,786,901

02-M172
U.S Department of Agriculture, National Agricultural Statistics Service

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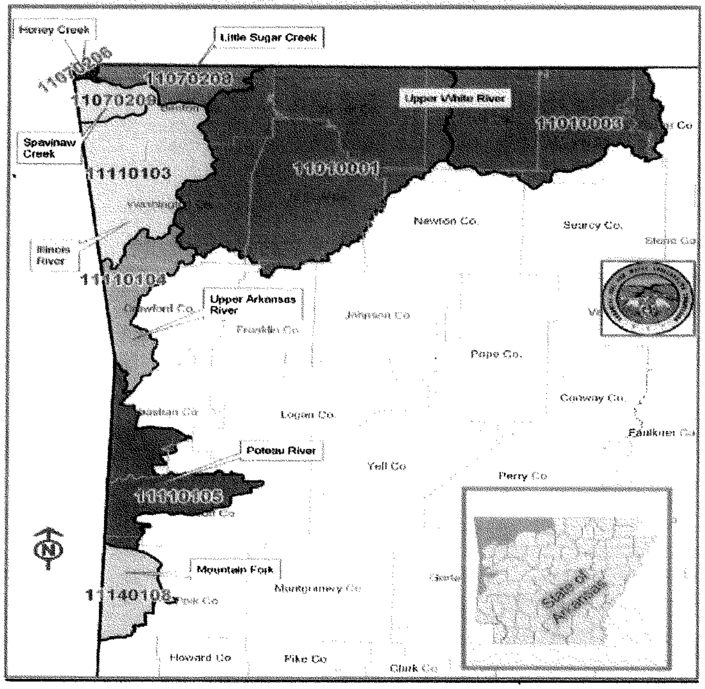
Appendix A: Nutrient Surplus Areas. Numbers Indicate Hydrologic Unit Codes.



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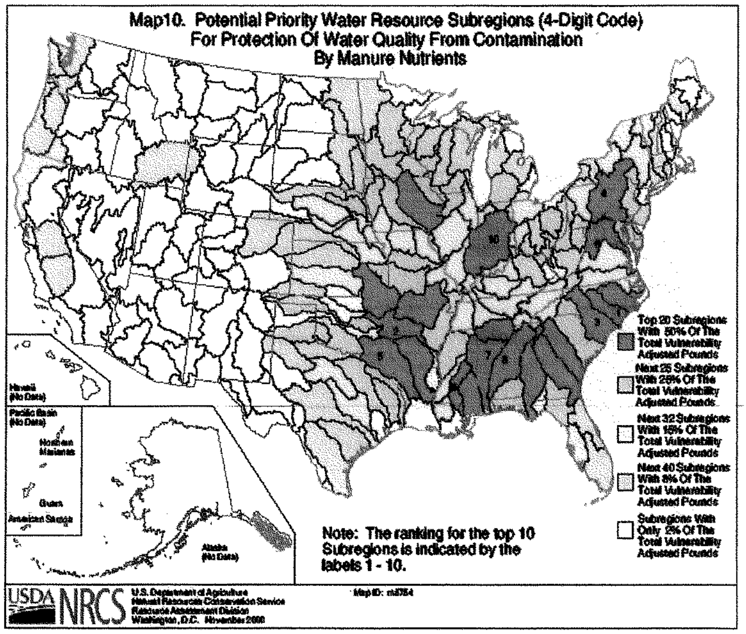

Map10. Potential Priority Water Resource Subregions (4-Digit Code) For Protection Of Water Quality From Contamination By Manure Nutrients

Top 20 Subregions With 50% Of The Total Vulnerability Adjusted Pounds
Next 25 Subregions With 25% Of The Total Vulnerability Adjusted Pounds
Next 32 Subregions With 15% Of The Total Vulnerability Adjusted Pounds
Next 40 Subregions With 8% Of The Total Vulnerability Adjusted Pounds
Subregions With Only 2% Of The Total Vulnerability Adjusted Pounds
Hawaii (No Data)
Pacific Basin (No Data)
Northern Marianas
Guam
American Samoa
Alaska (No Data)
1
2
3
4
5
6
7
8
9
10
USDA NRCS
U.S. Department of Agriculture
Natural Resources Conservation Service
Resource Assessment Division
Washington, D.C. November 2000

Note: The ranking for the top 10 Subregions is indicated by the labels 1 - 10.

Source: Potential Priority Watersheds for Protection of Water Quality from Contamination by Manure Nutrients, http://www.nrcs.usda.gov/technical/land/pubs/wshedpap_w.html
November 2000

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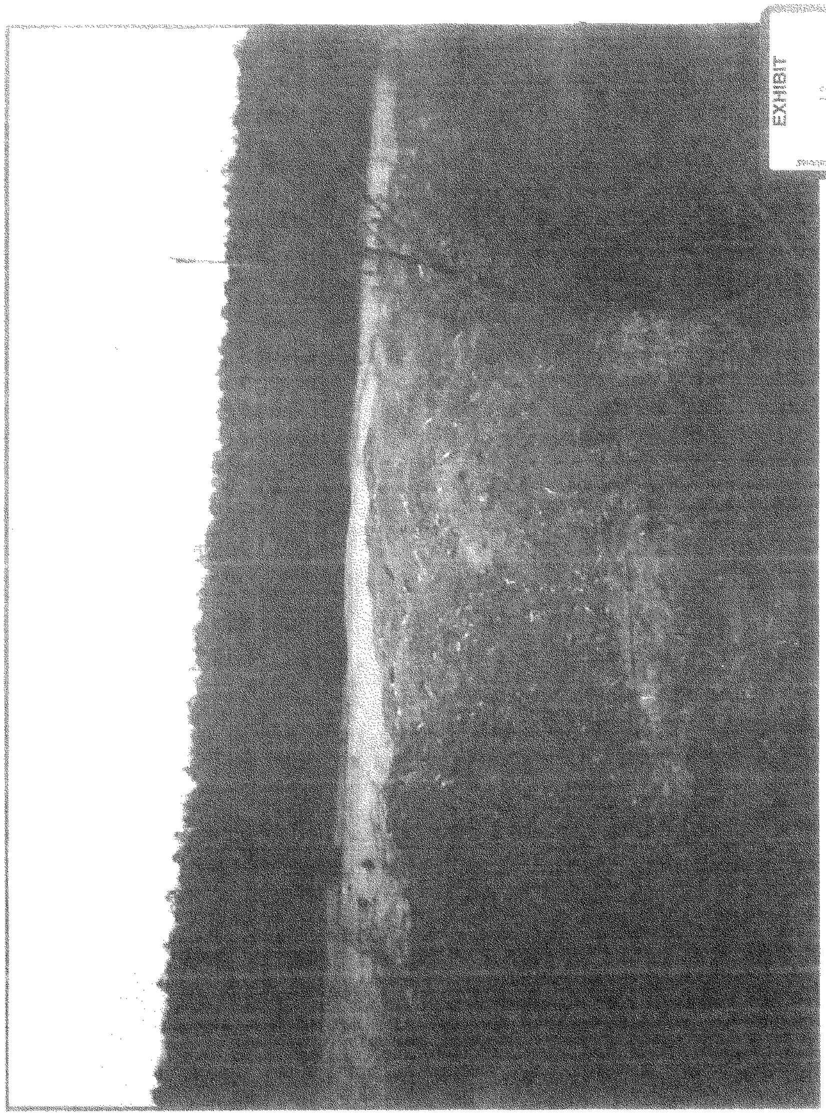

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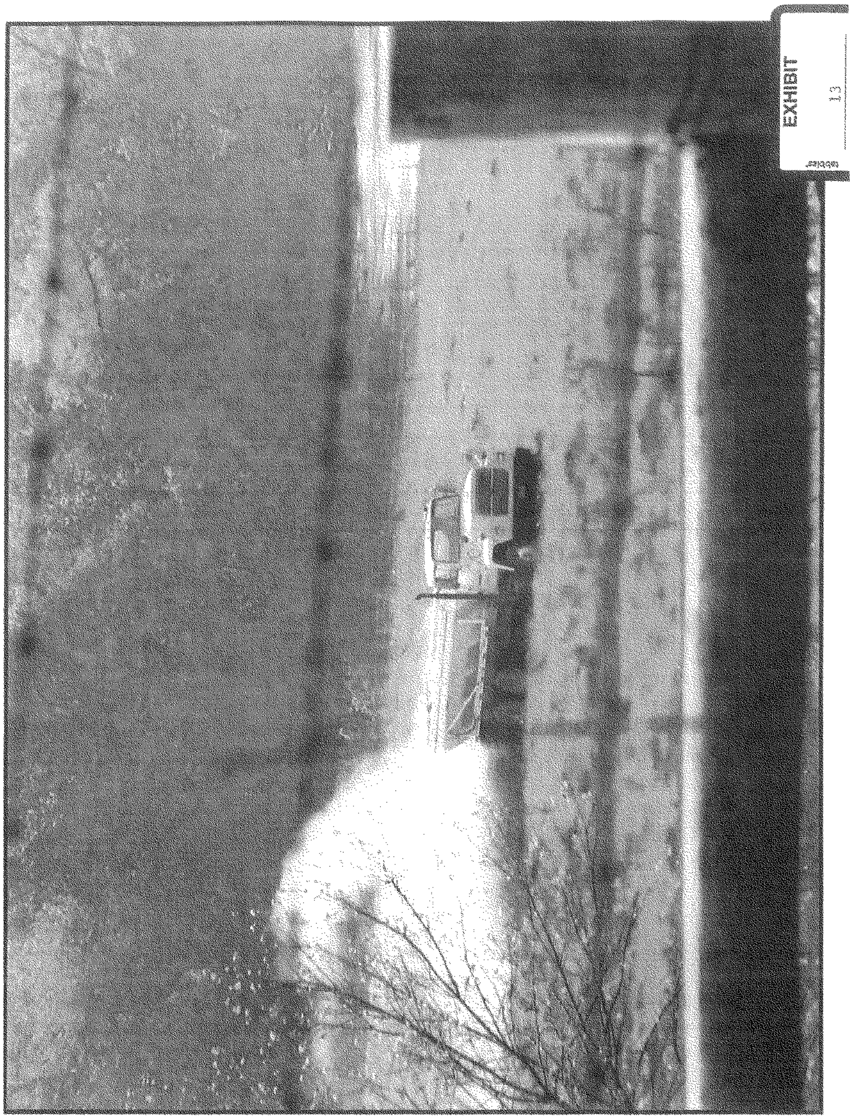

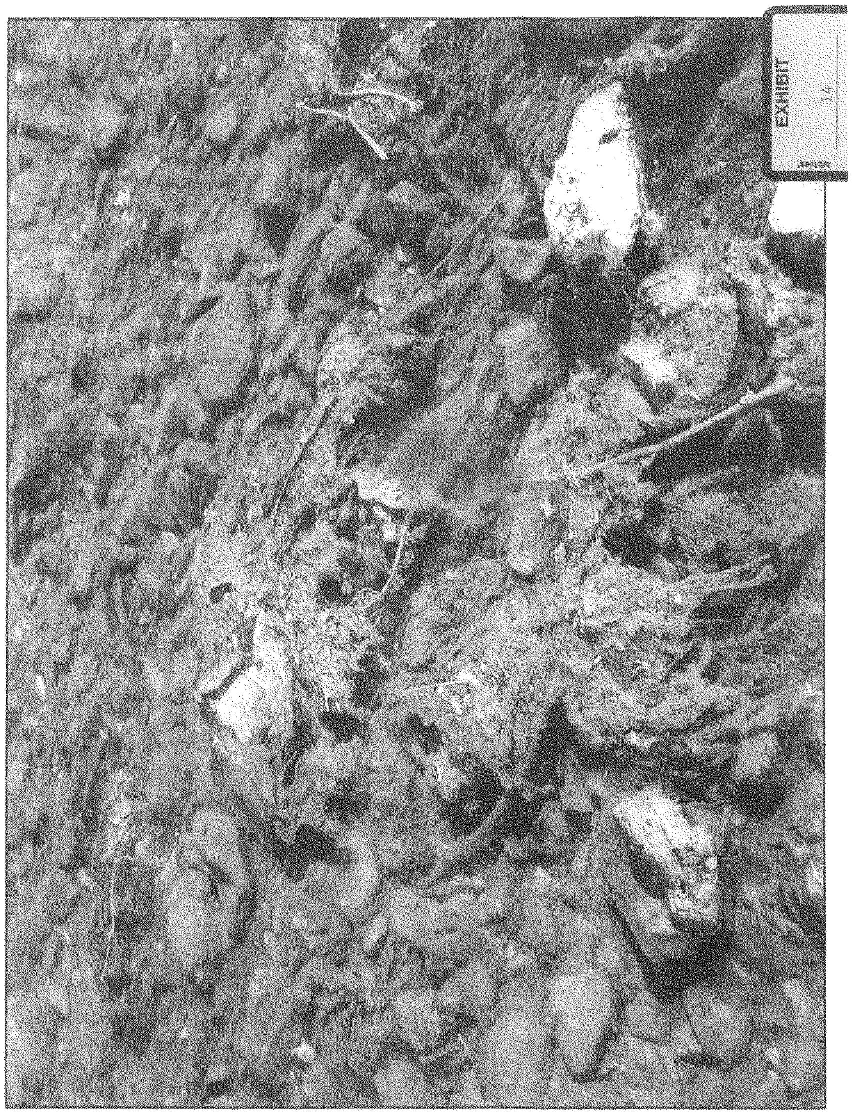
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Mr. GILLMOR. Thank you, Ms. Burch. And before I go to Mr. Stem, I want to thank Congressman Deal for so expeditiously handling the hearing while I had to be at another mark-up. Mr. Stem.

STATEMENT OF WILEY STEM III

Mr. STEM. Thank you, Mr. Chairman and members of the committee. I wanted to let you all know that I have worked for the city of Waco for 29 years and mostly in the Public Works area. I also wanted to tell you that since 1961, my family has owned and operated a cow/calf operation in Falls County, Texas, and for the past 20 years, I have been a member of the Farm Bureau.

Lake Waco represents the public drinking water supply of the city of Waco, and a significant source of drinking water for many surrounding communities, approximately 150,000 citizens. There is no viable alternative to this water source. Over the last 20 years, Lake Waco water has become impacted due to the flow of phosphorous from the North Bosque River into Lake Waco, which is directly attributable to the discharge of phosphorous from waste application fields on dairy CAFOs.

The EPA and the Texas Commission on Environment Quality have identified the North Bosque River as impaired. In July of 2004, the TCEQ issued a report stating that 90 percent of the controllable phosphorous in the North Bosque River comes from concentrated animal feeding operations, or CAFOs. The Texas Institute for Applied Environmental Research, located in the heart of dairy country in Stevenville, Texas, has been studying this issue for the past decade, and has concluded that 35 percent of the phosphorous in Lake Waco comes from dairy CAFO waste application fields. They also concluded that without substantial reducing, runoff of phosphorous from the dairy fields, the overloading of phosphorous in Lake Waco cannot be resolved. Scientific studies have shown that excess phosphorous floating in Lake Waco causes algae blooms, and those blooms cause taste and odor problems with water in our lake. It is unquestioned that the dairy CAFOs have, and will continue to be, the major source of overloading Lake Waco, causing taste and odor problems with the water from the lake.

I think it would be helpful to go over some statistics regarding the waste generated by dairy cows in the North Bosque Watershed. A dairy cow generates up to 150 pounds of waste a day. Considering that there are over 50,000 permitted head of dairy cow in the watershed, the amount of waste produced each day would exceed 5,750,000 pounds, which is 2,875 tons of waste each day. A single dairy cow may produce as much as 40 pounds of phosphorous per year, or more, which means permitted cows in our watershed would produce as much as 2 million pounds of phosphorous each year.

Over the last 10 years, the city has worked with every stakeholder group to find a resolution to the issue. Our community is very sensitive to the agriculture industry, as it is such an important part of our economy. Being unable to get rules and standards for the dairy CAFOs that would give us some reasonable assurance that Lake Waco would be protected, and being unable to get the dairy industry to accept any responsibility or make any meaningful operational changes, we noticed 15 dairies in the watershed of our intent to sue under the Clean Water Act and CERCLA.

We gave them a 60-day notice and invited them to discuss resolution with us. One of the 15 dairies contacted us. We did not sue that dairy and are still in discussions with that dairy. The other dairies didn't contact us, so we filed suit against those 14 dairies. Over the course of the next year, we settled with eight of the dairies in a manner that allowed them to continue profitable operation while agreeing to changes that will protect our lake.

As part of that lawsuit, the City included claims under CERCLA. Now there is an effort to amend CERCLA to exclude animal manure. I believe that such an amendment is unnecessary. However, the city of Waco would support language that would clarify protection for the family farm. We would not support language that would provide protection for CAFOs.

To summarize, all credible scientists who have studied this problem have concluded that the dairy CAFOs are the latest single controllable source of phosphorous and pollution in the Lake Waco Watershed. In light of that fact, why should a law be passed that gives the dairy CAFOs an automatic pass and prevents them from having any accountability for their failure to properly handle their waste. Why should the taxpaying citizens of Waco have to bear all the costs of the waste being put into the lake when the dairies could buy grain, do some relatively simple modifications in their waste disposal practices, substantially minimize further pollution of our lake.

In the face of the dairy CAFOs refusal to change their practices to prevent damage or to be held accountable in any way for the damage they have already caused, CERCLA is an appropriate remedy and a necessary statute. Thank you.

[The prepared statement of Wiley Stem III follows:]

PREPARED STATEMENT OF WILEY STEM III, ASSISTANT CITY MANAGER, CITY OF WACO, TEXAS

I. INTRODUCTION

My name is Wiley Stem. I have been an employee of the City of Waco for the past 29 years. Over that time I have worked as a management analyst, assistant director of public works, water/wastewater supervisor, and director of water distribution and wastewater divisions. In 1999 I assumed a position as Assistant City Manager, which is the position I currently hold. As Assistant City Manager my responsibilities and duties include overseeing several different departments within our local government, including water utilities, environmental services, general services, public works, human resources and parks and recreation.

I received a Bachelor of Business Administration degree from Baylor University in 1976. I am a member of the International City Management Association (ICMA), the Texas City Management Association (TCMA), American Water Works Association (AWWA), and Water Environment Federation, and for the past twenty years I have been a member of the Texas Farm Bureau. I currently serve on the Brazos G Regional Water Planning Group and am chair of the Waco Metropolitan Area Regional Sewerage System. I have also served on the United Way board. On a personal note, my family has had a farm in Falls County since 1961, and we continue to have a cow/calf operation there.

I want to thank the Subcommittee on Environment and Hazardous Materials for allowing me to testify regarding proposed amendments to CERCLA that would exclude animal manure and anything in it from the list of hazardous substances covered by the statute.

II. HISTORY AND CHARACTERISTICS OF LAKE WACO

Lake Waco is located in the southeastern portion of the Bosque River Watershed, Brazos River Basin, entirely within McLennan County, Texas, and on the northwestern edge of the Waco city limits. In or about 1928, construction of a dam to impound Lake Waco began and was completed around 1930.

Lake Waco is fed by the North Bosque, the Middle Bosque, and the South Bosque rivers, and by Hog Creek. The contributing watershed to Lake Waco is approximately 1,652 square miles with about 1,260 square miles in the North Bosque River watershed. The North Bosque River and its tributaries flow downstream and terminate in Lake Waco, which means that pollutants dissolved and entrained in the waters of the North Bosque are carried into, and ultimately deposited in, Lake Waco.[1]

In or about 1958, the City of Waco, with the assistance and support of the U.S. Army Corp of Engineers, began construction of a second larger dam on Lake Waco to provide additional flood control and drinking water. That project was completed in or about 1965.

III. USES OF AND IMPORTANCE OF LAKE WACO

Lake Waco represents the public drinking water supply for the City of Waco and a significant source of drinking water for many surrounding communities approximately 150,000 citizens.

Additionally, Lake Waco is used for a wide variety of recreational activities, including fishing, boating, swimming, and water skiing. Lake Waco shores also provide recreational activities and amenities in the form of parks, picnic areas, boat docks and camping facilities. Lake Waco is also put to a variety of other municipal purposes, including irrigation and conservation.

A clean and reliable source of drinking water is indispensable to the health and welfare of the citizens of Waco and is also essential to the existence and growth of business and industry in Waco. A substantial supply of clean water is also critical to the City's ability to maintain and attract industrial enterprises.

Lake Waco is the regional water supply. There is no viable alternative to the Lake as the regional water supply, and that will continue to be the case into the foreseeable future.

IV. THE EFFECT OF DAIRY WASTE

In the later half of the 1980's, large industrial dairy operators began moving into counties in the North Bosque River watershed. This influx of dairy operators into the watershed coincided with a massive increase in the amount of nutrients, and specifically phosphorus, which were being released into the North Bosque River and ultimately deposited into Lake Waco. The waste from these dairies is the single most important cause of the environmental problems that are occurring in the North Bosque River watershed and Lake Waco.

A. Dairies Produce Huge Amounts of Waste

A dairy cow generates up to 115 pounds of manure per day or more. If we look only at the fourteen dairies that either were or presently are involved in a lawsuit with the City of Waco, the permitted cows from those diaries would account for in excess of 1,600,000 pounds of manure per day. Considering that there are over 70 dairies in the North Bosque River watershed that have over 50,000 permitted head of dairy cattle, the amount of manure produced each day would be in excess of 5,750,000 pounds, or 2,875 tons of manure every day. In addition to the solid waste generated by the dairy cows, the cows produce large amounts of liquid waste.

In addition to the milking cows and the waste they produce, some dairies maintain additional cows on their dairy which are not milked on a daily basis. Those "dry cows", as they are called, can add another 7 to 15 percent to the overall size of the cow population on the dairy, and the amount of waste produced by those dairies.

Best management practices indicate that to properly dispose of waste, a dairy operator should maintain 1.5 to 3 acres of land per dairy cow. For example, a 2,000 cow dairy ought to have 3,000 to 6,000 acres of land to properly dispose of waste produced by their cows. The concentration of cows at dairies in the North Bosque River watershed is often far greater than that. In many instances, dairies in this region maintain less than ¼ to ⅕ an acre per cow. One of the dairies in the lawsuit brought by the City of Waco has 396 permitted acres of waste application fields on which to dispose of the waste from 2,000 cows, and is seeking a permit amendment to increase herd size to 3,000 cows, without increasing the number of acres of permitted waste application fields. Another dairy involved in the City of Waco lawsuit is seeking to increase it's permitted number of cows to 2,500, despite the fact that the dairy in question only has 83 acres of permitted waste application fields.

---

[1] Two maps of the North Bosque River Watershed and Lake Waco are attached as "Exhibit A"

The solid and liquid cow waste contains many pathogens and bacteria. Significantly, the huge amounts of solid and liquid waste generated by the dairy cows contain very high concentrations of phosphorus. A single dairy cow may produce as much as 40 pounds of phosphorus per year or more, which means permitted cows in our watershed would produce as much as 2,000,000 pounds of phosphorus each year.

B. Dairies in the North Bosque River Watershed Have Failed To Properly Handle Liquid and Solid Waste

The phosphorus being released by these dairies is a pollutant and is poisonous. Both CERCLA and the Clean Water Act recognize phosphorus as a hazardous substance.

Because of the enormous amounts of waste generated on a daily basis by dairies, it is critical that the dairy operators dispose of such waste properly and in a way which ensures that the waste does not reach the water supply. Many of the dairies in the North Bosque River watershed have failed to properly manage and dispose of the waste from their large commercial dairy operations. Two photographs are attached as "Exhibit B", which show a dairy in the watershed where waste has been over-applied on a waste application field, and that waste is running directly into a tributary of the North Bosque River. Their continued failure to do so has resulted in the pollution of Lake Waco and substantial damage and injury to the citizens of central Texas who rely on Lake Waco.

Liquid waste from cows and slurry resulting from washwater being combined with solid waste from cows is collected in "lagoons" located on the dairies. Because the lagoons are comprised of liquid waste, as well as some substantial percentage of solid waste, the contents of those lagoons is very high in phosphorus and other hazardous substances. Those lagoons are supposed to be specially and properly lined to ensure that the liquid waste is contained and does not leach into the ground and into the groundwaters and water supplies. Many of the dairies in this region have failed to construct and maintain their lagoons in a way which prevents leaching.

Dairy operators are supposed to control the levels of the lagoons to ensure that they do not overflow during rain and other events. Those overflows, which are referred to as unauthorized discharges, are to be prevented because, when they do occur, the waste runs, in an uncontrolled manner, onto and over the land, off of the dairies and into the groundwaters and surface water supplies. Again, the large industrial dairies in the North Bosque River watershed have failed to control the levels of their lagoons and have improperly maintained their lagoons. These failures and omissions have resulted in wastewater running out of the lagoons and into the watershed. This runoff occurs not only in significant rains, but also at times when there is no or relatively small rainfall events. Such occurrences are in violation of these dairies' permits and in violation of state and federal law.

On those frequent occasions when the dairies have attempted to reduce the volume of materials in their lagoons by spreading it on their fields, they have frequently done so in a manner which results in contents of the lagoons entering the creeks, the watershed and the Lake Waco water supply.

These large industrial dairies also generate and have to dispose of enormous amounts of phosphorus-containing dry manure. With their permitted cows, the fourteen dairies that were or are defendants in the City of Waco's lawsuit alone would generate in excess of 800 tons of solid cow waste per day, which has to be disposed of on-site or is stored in piles while waiting to be transported off-site.

The dairies routinely store large amounts of solid waste on their property in waste storage areas. The waste in the waste storage areas will be disposed on-site or transported off-site. The phosphorus in such manure waste is present at levels which are far greater than those present in normal agricultural operations. Several times a year, there are heavy rains which turn portions of this stored waste into liquid manure that runs off of dairy waste application fields and into the watershed which supplies Lake Waco.

As a result of the conduct of some large industrial dairies in the North Bosque River watershed, large amounts of manure-laden waste make its way into the North Bosque River. This has dramatic detrimental effects on Lake Waco.

Dairies also dispose of some of the waste they generate by spreading it on waste application fields on their facilities. Because the land they possess is so relatively small in comparison to the number of cows they have confined in their pens, many of the dairies long ago exceeded the natural capacity of the soils and vegetation on their facilities to absorb the phosphorus or for the soil to otherwise assimilate the phosphorus.

Fields containing phosphorus at levels in excess of 60 to 80 parts per million (ppm) exceed the amount of phosphorus needed for optimal growth for any type of plant. At levels of 200 ppm and higher, not only is there far more phosphorus than can be used by plants, but there is also a very high risk that the phosphorus will run off of the fields and into the water supply at concentrations detrimental to the water supply. Once soil phosphorus reaches levels in excess of 200 ppm, the time required for the phosphorus levels to decline is considerable; that process can take years or even decades. Thus, the risk of runoff from fields with phosphorus levels in excess of 200 ppm is considerable and extended.

Many of the dairies in the North Bosque River watershed have greatly over applied waste to their waste application fields and have thereby caused those fields to reach soil phosphorus levels that exceed 200 ppm. In fact, over the past five years over 50 dairies in the watershed have applied so much waste that one or more of their fields have exceeded 200 ppm according to annual soil samples taken by the Texas Commission on Environmental Quality ("TCEQ"). During that same five year period, there have been over 200 individual waste application fields on dairies in the watershed exceeding 200 ppm according to those same TCEQ samples. At the same time, these dairies have failed to properly maintain their waste application fields, and therefore the risk of runoff is even greater. These dairy CAFOs have crossed the line from beneficial use to waste disposal, and that disposal is adversely affecting our drinking water.

Any application of manure and waste products containing phosphorus to a waste application field in excess of 80 ppm is not for agricultural purposes; instead, it is simply for the disposal of waste. Even the TCEQ has concluded that when a field gets to 200 ppm there is a significant risk of runoff from that field during rainfall events into the streams and rivers in the watershed.

Large industrial dairies in the watershed have permits issued to them by the State of Texas which require them to conduct their operations in accordance with various laws, rules and regulations. Many of those dairies have operated their dairies and maintained their land in such a way as to have consistently and egregiously violated the applicable laws and regulations, and they continue to do so.

Discharges by dairies into the North Bosque Watershed have caused the quality of the water in Lake Waco to deteriorate. The manure-laden waste entering the watershed from the large industrial dairies along the North Bosque River pollutes and fouls Lake Waco. Among the problems such pollution creates, is that the phosphorous contained in such waste causes the growth of algae, which generates substantial taste and odor problems with the water in Lake Waco.

V. TASTE AND ODOR PROBLEMS

Prior to the late 1980's the City of Waco experienced taste and odor problems with the water from Lake Waco only on a sporadic and episodic basis. Those sporadic and episodic taste and odor problems in the water were resolved without the City of Waco having to resort to special water treatment methods.

In or about the late 1980's, large industrial dairy operators began moving into Erath County and into the North Bosque River watershed.

A. The Development of Taste and Odor Problems in Lake Waco

In about 1988 there were very notable increases in the levels of algae in Lake Waco. The mass and volume of algae increased to levels which had never before occurred in Lake Waco. There was and is a direct correlation between the increased levels of phosphorus in Lake Waco resulting from dairy waste runoff, increased levels of algae in the Lake and the taste and odor problems with the water in Lake Waco. As the algae level in the lake increased, so did the taste and odor problems with the water. The problems became so bad and so greatly affected the quality of the water that the City began using a different and additional treatment process in order to make the water acceptable for human consumption.

From about 1988 to December of 1996, the frequency and severity of the taste and odor problems with the water in Lake Waco continued to increase dramatically. There was a corresponding increase in the efforts and expense required of the City to reduce such taste and odor problems to an acceptable level. During that timeframe, those efforts increased in both frequency and degree.

In about December of 1996, the City of Waco experienced a tremendous algae bloom and a severe episode of taste and odor problems in the water in Lake Waco. Since that time the City of Waco has had to continually employ treatment methods it would not otherwise use. Those treatment methods involve adding a substance to the water whose sole purpose is to reduce the substantial taste and odor problems of the water from Lake Waco. Unfortunately, the City's increasing efforts are also becoming increasingly less effective while at the same time becoming increasingly more expensive.

The City treats the taste and odor problems by putting additives into the water. The City is putting those additives into the water continually and at very high levels. Despite the high levels at which the additives are being put into the water, those additives are becoming much less effective at improving the taste and odor of water out of Lake Waco, and, over time, such problems with the City's water source have continued to increase. Additionally, the City is reaching the upper limit of the level at which those additives can be put into the water, because, at very high levels, those additives cause adverse side effects by producing undesirable chemical byproducts and by adversely affecting other aspects of the treatment process.

The water quality of Lake Waco is substantially impaired. The taste and odor problems with the water in Lake Waco are the result of the overabundance of blue-green algae, which is caused by the high concentrations of phosphorus coming into Lake Waco from the high phosphorus level waste application fields and the overloaded lagoons on the dairies in the North Bosque watershed.

The City of Waco has incurred substantial costs as a result of the inappropriate waste management practices of large industrial dairies in the watershed. Since 1995, the City of Waco has spent close to $3.5 million to address taste and odor problems in Lake Waco. Those expenditures are in excess of those which would have otherwise been made for water treatment. Ongoing remedies for treatment of taste and odor problems which are caused by excessive phosphorus from dairies currently consume more than half (as much as 55 percent) of the City of Waco's chemical water treatment budget. Prior to 1996, that figure was about 10 percent.

Even though the City has been and continues to be very aggressive and diligent in its efforts to treat the taste and odor problems in Lake Waco's water in an efficient and effective manner, its current treatment methods are only able to remove approximately 70 percent of the substance which causes the offending tastes and odors. Although greatly reduced, the remaining 30 percent is still at a level which causes the water from Lake Waco to be quite offensive in taste and smell to the average person. Further, because the City is currently unable to sufficiently reduce such taste and odor problems and because of concerns about this problem increasing in the future, the City has found it necessary to add additional, advanced water treatment equipment and facilities to its two existing water treatment plants. Projected costs of the new water treatment equipment and facilities to deal with the taste and odor problems exceed $80 million dollars. The equipment and facilities necessary to treat the taste and odor problems will do nothing to improve the quality of water in Lake Waco other than hopefully eliminate the taste and odor problems caused by the phosphorus from the dairies. It is clearly unfair for our citizens to bear the costs of cleaning up someone else's waste.

Phosphorus and the resulting taste and odor problems are just one of the problems which have developed with the water in Lake Waco as a result of pollution from the dairies. Runoff and pollution from the dairies have resulted in pathogens and pollutants, in addition to phosphorus, entering and imperiling the water of the North Bosque River and Lake Waco. The pathogens, which are borne in the cow manure and which enter Lake Waco, have created concern about the health of the citizens and the safety of the water to the citizens who fish, swim, ski and engage in other water activities in Lake Waco. If this pollution is allowed to continue unabated, there is the potential for substantial risk to the health and welfare of the users and consumers of Lake Waco water.

B. Phosphorus Released from Dairy Cow Waste is the Single Most Significant Cause of Taste and Odor Problems in Lake Waco

Segments of the North Bosque River upstream from Lake Waco have been placed on the national list of impaired waters after it was determined by both the TCEQ and the Environmental Protection Agency ("EPA") that these waters were severely impaired due to high concentrations of nutrients, principally phosphorus. This data has been confirmed through many scientific and peer-reviewed studies.

Two Total Maximum Daily Loads (TMDLs) for soluble reactive phosphorus in the North Bosque River were adopted by the TCEQ and approved by EPA in 2001. TCEQ approved a plan to implement these TMDLs. The TMDLs are designed to reduce the amount of phosphorus in the North Bosque River.

TCEQ reported in its July 2004 Status Report[2] on implementing the TMDLs that approximately 90% of the controllable phosphorus entering the North Bosque River originates from concentrated animal feeding operations (CAFOs) located in the watershed.

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[2] Attached as "Exhibit C"

The Texas Institute for Applied Environmental Research (TIAER) at Tarleton State University in Stephenville, which performed much of the study supporting the TMDLs, has concluded that approximately 35-44% of the phosphorus in Lake Waco comes from dairy waste application fields.[3] This is more remarkable given that those fields comprise only approximately 2% of the land use in the watershed.

TIAER studies have concluded that high concentrations of phosphorus in Lake Waco cannot be corrected without substantially reducing runoff of phosphorus from the dairy waste application fields. Dairies in the North Bosque River watershed have caused and continue to cause pollution to Lake Waco through their wrongful discharge of waste and other pollutants into the North Bosque River watershed.

The continued pollution caused by these large industrial dairies will result in future costs and expenses to investigate and treat the problem until a final remedy is developed and implemented. If this problem is not quickly addressed and the polluting conduct not abated, the current water supply may be irreparably damaged.

VI. THE CITY OF WACO HAS ENGAGED IN CONSIDERABLE EFFORTS TO PROTECT WATER QUALITY IN LAKE WACO

For the better part of the last decade, the City of Waco has been involved in several different efforts to resolve the impact of phosphorus loading in Lake Waco. The City of Waco has met with stakeholder groups, which included the Bosque River Advisory Committee, TIAER, the Texas Association of Dairymen, the Bosque River Authority, and the TCEQ, to try and find a meaningful and effective solution to the problems in the North Bosque River watershed.

After eight years of attempting to resolve these issues by meeting and negotiating with dairy operators in the watershed, the City of Waco was unable to achieve any meaningful solution to the problem. In fact, the City of Waco was unable to get any of the dairies to even admit that they were contributing to the problem, despite the fact that every known public or private study that has examined these issues has concluded that the dairies are the most significant cause of the overloading of phosphorus into Lake Waco.

As a result of the dairies unwillingness to resolve these issues, the City of Waco sent out letters to fifteen different dairies in the watershed notifying those dairies that a suit would be filed by the City of Waco against those dairies unless those dairies contacted the City of Waco within 60 days and sought to resolve the issue. Only one dairy responded to this letter, and the City has worked with that dairy to resolve the issues and has not sued that dairy.

After these extensive efforts to resolve these issues failed to result in any meaningful agreements to improve water quality, the City of Waco brought suit against fourteen large industrial dairies in the North Bosque River watershed, based on the poor TCEQ regulatory compliance records of those dairies. This lawsuit is brought under both the federal Clean Water Act and the federal Superfund statute (CERCLA) and its goal is primarily to bring about improvements and modifications of waste handling practices of the concentrated animal feeding operations ("CAFOs") in the watershed. CAFOs are large industrial agricultural operations that confine large numbers of animals in a manner that vegetation cannot be sustained in the confinement areas. Dairies are considered CAFOs if they confine more 200 mature dairy cows.

Since the filing of the lawsuit against the fourteen dairies by the City of Waco as a last resort effort to try and clean up Lake Waco there have been numerous opportunities for citizens to come to Waco City Council meetings during the public comment agenda items and express their opposition to the continued prosecution of this lawsuit. There have been no complaints by the citizens of Waco about this suit. In addition, the local newspaper, the Waco Tribune-Herald, has afforded the opportunity for dairy representatives to write guest columns criticizing the lawsuit as an unnecessary waste of City funds, but we are not aware of any letters to the editor by Waco citizens complaining of the lawsuit. When a governmental body such as the City of Waco can take such action and receive no criticism from its citizens, this is a very strong indication that the citizens of Waco, who are the ones who have to drink and smell the water from Lake Waco, support the City's actions on this matter. In addition, the editorial board of the Waco Tribune-Herald has on numerous occasions indicated that the lawsuit is justified in view of the problems being caused by the dairies and the importance of Lake Waco as the drinking supply for 150,000 local citizens.[4]

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[3] Attached as "Exhibit D"

The City's lawsuit to date has been highly effective. The City has settled with eight of the fourteen original dairy defendants. Under the settlements, the dairies have agreed to certain changes in their management practices which the City believes will let them continue agricultural operations and at the same time protect the river and the lake. None of the dairies that have settled with the City of Waco have paid money to settle the lawsuit. In one case, an insurance company for one of the dairies paid a cash settlement on behalf of that dairy, practically all of which the City of Waco then returned to the dairy operator in exchange for a conservation easement prohibiting the over polluted land on that dairy from ever again being used as a CAFO, but allowing it to be used for other agricultural purposes. The lawsuit is still pending in the United States District Court for the Western District of Texas—Waco Division, before Judge Walter Smith, against the six CAFOs that have not settled with the City. The lawsuit is set for trial in May 2006.

In this lawsuit, the defendant dairies have contended that phosphorus in dairy manure and liquid waste is not a "hazardous substance" under CERCLA. This same argument was made by the poultry industry in response to a lawsuit filed by the City of Tulsa and the United States District judge in Oklahoma ruled that the phosphorus in manure, under the mixture rule, is a hazardous substance.[5] The defendant dairies also sought dismissal of the City of Waco's lawsuit under rule 12(b), Federal Rules of Civil Procedure, arguing that the phosphorus in dairy cattle manure is not a hazardous substance under CERCLA, but Judge Smith denied the dairies' motion to dismiss and referenced the "mixture rule" as did the District Court in Oklahoma.

VII. PROPOSED AMENDMENTS TO CERCLA

Having lost twice in court in attempts to argue that large quantities of phosphorus are not a hazardous substance under CERCLA, these large industrial polluters are attempting to get Congress to amend CERCLA to exempt "manure" from the definition of "hazardous substance", and mischaracterize the proposed amendment as one needed to "protect family farms" and the agricultural industry in general. This exemption would go far beyond just an effort to protect family farms or the agricultural industry in general but would instead exempt CAFOs, which are large industrial operations, or any other industry that pollutes with manure, from liability under CERCLA. If the amendment becomes effective, as it has been proposed, in all probability the dairies who remain defendants in the City of Waco lawsuit will argue that the Court must dismiss the City's pending CERCLA claims. Further, the amendment will allow all other dairies in the watershed of Lake Waco to pollute free and clear of potential liability under CERCLA for the consequences of their actions.

An amendment could easily be drafted to exempt routine agricultural operations that produce manure, but that would not exempt large industrial CAFOs. However, such an amendment is not necessary to protect family farms, or even the agricultural industry in general. CERCLA already includes an exemption from liability for the "normal application of fertilizer."[6] When a family farm or a any agricultural operation applies manure to its fields in an amount necessary to support crops, that farm is not liable under CERCLA because of the already existing exemption in CERCLA for the normal application of fertilizer. It is only when manure is applied in amounts that exceed what is necessary to support crops that there is potential CERCLA liability. For example, some of the dairies involved in the City of Waco lawsuit have waste application fields that exceed 800 ppm of phosphorus when anything over 80 ppm is well beyond the amount necessary to facilitate the growing of corpse. The law as it currently exists strikes a balance by allowing lawsuits to be brought against those large industrial CAFOs that are not fertilizing their fields but are instead dumping waste on their fields and adversely impacting the environment by doing so, but still protects normal agricultural operators when applying manure or fertilizer to grow crops.

In addition, the requirement under the current law that anyone suing for response costs under CERCLA must prove that their response action complies with the National Contingency Plan further protects agricultural operations, and even to some extent large industrial operations, from CERCLA lawsuits by disgruntled neighbors or from frivolous claims. It is only entities like cities, counties, or states that can reasonably show that they have completed the necessary studies and analysis', considered other available remedies, elected reasonable cost alternatives, and taken the other steps necessary to comply with the national contingency plan.

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[4] See examples of editorials attached as "Exhibit E"

[5] *City of Tulsa v. Tyson Foods, Inc.,* 258 F.Supp.2d 1263 (N.D. Okla. 2003)

[6] 42 U.S.C. 9601(22).

As further evidence that the proposed amendment to CERCLA is not needed to prevent a rash of litigation against family farms or other agricultural interests, the City of Waco, in researching for and preparing its lawsuit against these dairies, is aware of only a few lawsuits filed against large industrial agricultural operations under CERCLA and is not aware of any suit filed against family farms or other routine agricultural operations that are not already regulated as CAFOs. The fact that only a few lawsuits have been filed nationally, which only involve large commercial operations as defendants, is certainly not an indication that family farming or normal agricultural operations are being burdened with litigation costs or otherwise being threatened by CERCLA as it is presently written.

CAFOs are a recognized source of potential pollution of the environment (by reason of their disposal of manure) and, for that reason, like other industries whose operations are a substantial risk of pollution, they cannot operate without a Federal or state issued permit. For the same reasons CAFOs are subject to permit requirements, whereas routine agricultural operations are not, CAFOs should also be subject to liability under CERCLA even though an exemption of routine agricultural disposal of manure would be appropriate.

The City of Waco is not opposed to an amendment that would specifically exempt manure produced by traditional family farms or other routine agricultural operations from liability under CERCLA, even though such an amendment is not needed for the reasons above discussed. However, the City is opposed to the amendment, as it has been proposed, because it is so broad that it would exempt from liability large industrial CAFOs that spread manure for disposal purposes rather than in a manner intended for beneficial agricultural use.

CERCLA is critical to ensuring a satisfactory outcome to not only the City of Waco's lawsuit against dairies in the North Bosque River watershed, but to ensuring that any municipality or other governmental entity will be successful in protecting it's citizens drinking water from the harmful over-application of phosphorus containing waste to waste application fields. It is true that the City of Waco could pursue its lawsuit under the Clean Water Act, but that piece of legislation does not afford the broad range of remedies that are available under CERCLA. Specifically, that statute does not allow for private recovery and thus does not afford the City of Waco an avenue to recover for its response costs. As can be seen from the City of Waco settlements with eight dairies, often just exposure to liability for response costs will cause industrial polluters, like the dairies in our watershed, to adopt better and more environmentally sound waste management practices. CERCLA lawsuits do not always result in monetary awards, sometimes they result in corrective action to clean up the environment. It is also not unreasonable or unfair for large industrial agricultural operations, like the dairies in our watershed, to be liable for the response costs that they actually cause others to incur in accordance with the National Contingency Plan, which is designed to ensure a proper and quality response to pollution. Put simply, without liability under CERCLA for the over-application of manure it will be nearly impossible for municipalities like Waco or other governmental entities to get effective and meaningful relief against large industrial operations that pollute our nations waters by adding large quantities of phosphorus and other nutrients to valuable water supplies.

VIII. CONCLUSION

Based on the foregoing discussion, and because of all of the harmful effects that will result if large commercial dairies in the watershed are allowed to continue to over-apply manure without any risk of incurring liability under CERCLA, we ask that the members of this Subcommittee and of the United States House of Representatives oppose any amendment to CERCLA that would exclude manure from the definition of hazardous substance. Thank you for your time and your thoughtful consideration of this testimony.

Mr. GILLMOR. Thank you. Mr. Steven Kouplen?

STATEMENT OF STEVEN KOUPLEN

Mr. KOUPLEN. Thank you, Mr. Chairman. My name is Steven Kouplen. I am President of the Oklahoma Farm Bureau and a member of the American Farm Bureau—it is a pleasure to be here with you, Mr. Chairman. My name is Steve Kouplen. I am President of the Oklahoma Farm Bureau and a member of the American Farm Bureau Board of Directors. I am a cow/calf producer and run approximately 250 cows in the town of Beggs, which is in Okmulgee County, just south of Tulsa.

Quite frankly, I and my colleagues in the industry are greatly concerned at the prospect that animal manure could be regulated as a hazardous waste. Farm Bureau firmly believes that Congress never intended that animal manure be considered a hazardous waste and regulated under CERCLA, yet some people are attempting to get the courts to do something Congress never did. There are other members of the panel that will speak to that issue, but I would like to reinforce our hope that Congress will provide policy direction on this important matter. We ask that you affirm what we believe has been the consistent intent that animal manure is not a hazardous substance under Superfund.

Animal manure has been safely used as a fertilizer and soil amendment by many cultures over the world for centuries. Where would the organic agriculture industry be without it? However, in recent years, we have seen litigation challenged to the use of animal manure as a fertilizer by claiming contamination and damaged natural resources. There are three lawsuits where CERCLA claims have been made or are being made.

The first case, the city of Tulsa versus Tyson Foods, involved poultry companies with growers in the Lake Eucha Watershed. Lake Eucha is a drinking water source for the city of Tulsa. In that case, the U.S. District Court for the Northern District of Oklahoma stated in 2003 that “phosphate is found in all living cells, is safe, and is vital to life processes.” Yet the court then said that because phosphate is comprised of dangerous elemental phosphorous, phosphate in animal waste is a hazardous substance under CERCLA. How can phosphate be both life-giving on one hand and listed as a hazardous substance on the other? We disagree with the Tulsa court’s ruling as a matter of science and a matter of law. Fortunately, the ruling was later vacated under a settlement agreement and cannot be cited as a legal precedent.

In the second case, the city of Waco versus Dennis Schouten, litigation was brought by the Texas city against 14 individual dairies in the Lake Waco Watershed. The city of Waco was alleging that the phosphorous in cow manure is a hazardous substance. The Federal judge in the case has not dismissed the issue. The Waco case is currently in its discovery phase and is expected to go to trial next year.

In this connection, I would direct the subcommittee’s attention to an amicus brief in this case just last month by the Texas Department of Agriculture. It articulates in a thoughtful, straight-forward manner, what exactly why the law and the science dictate another conclusion. And I have copies I would like to submit for the record, Mr. Chairman.

Mr. GILLMOR. Without objection.

[The information referred to follows:]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THE CITY OF WACO, **Plaintiff,**	§	
v.	§	**CIVIL CAUSE NO. W-04-CA-118**
DENNIS SCHOUTEN, et al. **Defendants.**	§	

BRIEF OF AMICUS CURIAE TEXAS DEPARTMENT OF AGRICULTURE IN SUPPORT OF DEFENDANTS' MOTIONS REGARDING DISMISSAL OF CERCLA CLAIMS

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

KAREN W. KORNELL
Assistant Attorney General
Chief, Natural Resources Division

ANTHONY GRIGSBY
Assistant Attorney General
State Bar No. 08491500

ATTORNEYS FOR AMICUS,
TEXAS DEPARTMENT OF AGRICULTURE

October 13, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THE CITY OF WACO, **Plaintiff,**	§ § §	
v.	§	**CIVIL CAUSE NO. W-04-CA-118**
DENNIS SCHOUTEN, et al. **Defendants.**	§ § §	

BRIEF OF AMICUS CURIAE TEXAS DEPARTMENT OF AGRICULTURE IN SUPPORT OF DEFENDANTS' MOTIONS REGARDING DISMISSAL OF CERCLA CLAIMS

TO THE HONORABLE WALTER S. SMITH, JR.:

The Texas Department of Agriculture supports the motions urging dismissal of claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The plain meaning and histories of the pertinent statutes and regulations establish as a matter of law that the listing of phosphorus as a hazardous substance includes only phosphorus in its elemental state.

STATEMENT OF INTEREST

The Texas Department of Agriculture (TDA), pursuant to Texas Agriculture Code § 12.002, is charged to "encourage the proper development of agriculture" throughout Texas. The Commissioner of Agriculture, Susan Combs, serves as vice-chair of the Texas Agricultural Policy Board, which the Texas Legislature created to provide information and guidance relating to the state's agricultural policy to lawmakers and other interested parties.

TDA is an active partner with state and federal agencies — for example, the U.S. Department of Agriculture, the Natural Resources Conservation Service, the Texas State Soil and Water Conservation Board, and the Texas Commission on Environmental Quality — in projects to investigate the impact of agricultural activities on natural resources and the environment and to develop and promote sound, sensible, and environmentally-responsible practices by the agricultural community.

No fee has been paid or is to be paid for preparing this brief.

FACTUAL BACKGROUND

The element phosphorus (chemical symbol: P; chemical formula: P_4) is toxic and highly reactive; it burns when exposed to warm air.[1] Elemental phosphorus does not occur naturally; industries produce it, typically from phosphate rocks,[2] for use as a feedstock to manufacture munitions, pesticides, fertilizers, and other chemicals.[3] The primary environmental exposure is to workers at or residents near manufacturing facilities or military training exercises or to people who ingest rat poison or fireworks.[4]

Because elemental phosphorus is so highly reactive with oxygen, when released to the environment it quickly forms relatively harmless chemical compounds.[5] It typically persists for a few minutes in the air, for a few hours in water, and for a few hours or days in soil.[6] However, if elemental phosphorous is sealed off from the environment, especially from oxygen (such as by being buried deep in anaerobic soil or sediment), it may persist much longer.[7] Elemental phosphorus has not been found in drinking water or in food (except fish and fowl near contaminated manufacturing or military sites).[8]

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[1] EPA *Phosphorus Hazard Summary* (2000), http://www.epa.gov/ttn/atw/hlthef/whitepho.html 3. A copy of the hazard summary is in App. A. References to pagination are to the printing in the appendix.

[2] Agency for Toxic Substances & Disease Registry (ATSDR), *Toxicological Profile for White Phosphorus* (Sept. 1997) §§ 1.1, 4.1. Selected pages of the profile are in App. B. The complete report may be viewed and downloaded at http://www.atsdr.cdc.gov/toxprofiles/tp103.html.

[3] EPA *Phosphorus Hazard Summary*, 1; ATSDR, *Toxicological Profile for White Phosphorus*, § 4.3.

[4] EPA *Phosphorus Hazard Summary*, 1; ATSDR, *Toxicological Profile for White Phosphorus*, §§ 1.3, 5.5-.6.

[5] ATSDR, *Toxicological Profile for White Phosphorus*, §§ 1.2, 5.3.

The primary non-military use of elemental phosphorus is to produce phosphoric acid and phosphates.[9] A phosphate molecule is one phosphorus atom surrounded by four oxygen atoms; the simplest phosphate is orthophosphate (PO_4^{-3}).[10] Phosphates and phosphorus are different and should not be confused. Phosphates are used in a wide variety of products, such as fertilizers (to nourish plants) and as a food additive (nourishing humans and animals).[11] EPA recommends adding orthophosphate to drinking water.[12]

Elemental phosphorus does not occur naturally.[13] In natural systems, such as soil and water, phosphorus exists as phosphate compounds, rather than in its elemental state.[14]

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[6] *Id.*

[7] *Id.*

[8] *Id.* § 1.3.

[9] *Id.* § 4.3.

[10] Univ. of Minn. Extension Service (UMES), *The Nature of Phosphorus in Soils*, (Univ. of Minn. Regents, 2002) at 1. The monograph is at http://www.extension.umn.edu/distribution/cropsystems/DC6795.html. A copy is in App. C.

[11] ATSDR, *Toxicological Profile for White Phosphorus*, § 4.3.

[12] EPA, *Fact Sheet: Orthophosphate, Drinking Water and Public Health* at 1. A copy of the fact sheet is in App. D. More information is available at http://www.epa.gov/dclead/.

[13] ATSDR, *Toxicological Profile of White Phosphorus*, § 1.1.

[14] UMES, *The Nature of Phosphorus in Soils* at 1.

Manure contains organic and inorganic phosphates,[15] not elemental phosphorus.

Many writers incorrectly use the word "phosphorus" when referring to phosphates.[16] As the Agency for Toxic Substances and Disease Registry noted:

> Phosphorus exists mostly in the phosphate form in the general environment. The levels of phosphorus determined in most environmental samples *are reported as total phosphorus and do not distinguish between elemental phosphorus and its compounds.* However, elemental phosphorus is far more toxic than other oxidized phosphorus states (oxides and acids of phosphorus).[17]

The City of Waco (Waco) in its pleadings and briefing confuses elemental phosphorus and phosphates. Waco does not complain about the toxic effects of elemental phosphorus. Rather, the essence of its complaint concerns over-nourishment of algae, which it says is responsible for incremental taste and odor problems in its drinking water.[18] Its reference to the listed hazardous substance elemental phosphorus as the nourishing substance, rather than to phosphates that are not listed, is wrong and inaccurate.

Several defendants filed motions to dismiss Waco's claims under CERCLA.[19] The Court entered interlocutory orders denying most of the motions, apparently agreeing with Waco's contention that cow manure is a mixture of a hazardous substance. The Hidden View Dairy defendants' motion to dismiss remains pending. Also, the AzTex Dairy defendants filed a motion for reconsideration and clarification of the interlocutory orders.

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[15] *Id.* at 3.

[16] ATSDR, *Toxicological Profile of White Phosphorus*, § 5.4.

[17] *Id.* (emphasis added).

[18] Third Amended Complaint ¶¶ 108, 111, 114.

[19] 42 U.S.C. §§ 9601-9675.

TDA supports the pending motions urging dismissal of the CERCLA claims.

SUMMARY OF THE ARGUMENT

The science underlying hazardous substance designations and the histories of the pertinent statutes and regulations show, as a matter of law, that cow manure is *not* a mixture of the listed hazardous substance, elemental phosphorus.

- Elements and compounds are chemically distinct. Elemental phosphorus (P_4) is distinct from the compound phosphate (PO_4). The Court should not treat elemental phosphorus and phosphate the same, any more than it would treat elemental hydrogen and water the same.
- Compounds and mixtures are different. The Court should not treat the compound phosphate as a mixture of elemental phosphorus. Cow manure is a mixture with phosphate compounds as constituent substances, not elemental phosphorus.
- EPA intended to list elemental phosphorus as a hazardous substance. It intended to regulate phosphates, such as those found in cow manure, as non-hazardous, non-toxic, non-conventional pollutants.
- Neither Congress nor EPA listed or intended to list all phosphorus compounds as hazardous substances — a conclusion supported by the case law.

Alternatively, if the proper characterization of cow manure under CERCLA were disputable, which TDA contends it is not, then the Court should refer the matter to EPA.

ARGUMENT AND AUTHORITY

I. The presence of phosphates in cow manure does not make cow manure a hazardous substance.

CERCLA defines a "hazardous substance" as a substance designated under various acts, including any hazardous substance listed under the Clean Water Act, any toxic pollutant listed under the Clean Water Act, and any hazardous air pollutant listed under the Clean Air Act.[20] Phosphorus is a listed hazardous substance under CERCLA because it was designated as a "hazardous substance" under the Clean Water Act and as a "hazardous air pollutant" under the Clean Air Act.[21]

A. Basic science supports the conclusion that phosphate is not the listed hazardous substance.

Congress directed EPA to identify the elements and compounds that are hazardous substances.[22] EPA included mixtures of those substances.[23] These terms — element, compound, mixture — have common scientific meanings that are part of everyday knowledge and understanding that shape statutory and regulatory construction.

1. Elements and compounds are chemically distinct.

"Element" is defined as: "A substance composed of atoms having an identical number of protons in each nucleus. Elements cannot be reduced to simpler substances by normal chemical means."[24]

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[20] 42 U.S.C. § 9601(14). Congress enacted the Federal Water Pollution Control Act in 1941, but it has been commonly called the Clean Water Act since the 1972 amendments. It is at 33 U.S.C. §§ 1251-1387. The Clean Air Act is at 42 U.S.C. §§ 7401-7671q.

[21] 40 C.F.R. § 116.4 (Clean Water Act list of hazardous substances), 42 U.S.C. 7412(b)(1) (statutory list of hazardous air pollutants); *see also* 40 C.F.R. § 302.4, Table 302.4. The table compiles the six lists of substances that constitute CERCLA "hazardous substances." The statutory source column indicates that phosphorus is listed pursuant to the Clean Water Act and Clean Air Act.

[22] 33 U.S.C. § 1321(b)(2)(A). App. P contains copies of pertinent statutes.

[23] 40 C.F.R. §§ 116.3, 116.4. App. Q contains copies of pertinent rules.

"Compound" is defined as: "A pure, macroscopically homogeneous substance consisting of atoms or ions of two or more different elements in definite proportions that *cannot be separated by physical means*. A compound usually has *properties unlike those of its constituent elements*."[25]

For example, elemental hydrogen is a highly flammable gas.[26] Elemental oxygen is a gas essential to nearly all combustion.[27] But the compound H_2O is a liquid used to douse fires. Thus, a compound's properties can be the antithesis of its elements' properties.[28]

Similarly, a seventh grade science textbook states:

> An **element** is a substance that cannot be broken down into any other substances by chemical or physical means. . . .
>
> A **compound** is a substance made of two or more elements that are chemically bound together in a set ratio. One of the most common compounds is water, made from two parts hydrogen and one part oxygen. . . .
>
> The properties of a compound can be very different from those of its elements.[29]

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[24] *American Heritage College Dictionary* (4th ed., 2004, Houghton Mifflin Co.) 452. Excerpts of definitions are included in App. E.

[25] *Id.* at 294 (emphasis added).

[26] *Id.* at 679. Unless noted otherwise, the brief describes the properties of elements and compounds at standard temperature and pressure (roughly, room temperature at mean sea level).

[27] *Id.* at 996.

[28] *See United States v. New Castle County*, 769 F.Supp. 591, 596 (D. Del. 1991) (noting that no one would seriously propose regulating the compound water as a hazardous substance just because it contained the element hydrogen).

[29] *Science Explorer, Grade 7* (Prentice-Hall, Inc. 2002) 26. Excerpts of the textbook are in App. F.

There is no reason, therefore, to presume that a phosphate compound will exhibit the properties of elemental phosphorus. Elemental phosphorus burns and desiccates plants;[30] phosphate nourishes them. Waco has not shown that phosphates exhibit the toxic, explosive characteristics of elemental phosphorus. Indeed, Waco complains about phosphate's beneficial, nutritious effects on aquatic plants.[31]

2. Compounds are not mixtures.

"Mixture" is defined as: "A composition of two or more substances *that are not chemically combined with each other and are capable of being separated.*"[32] The textbook notes that "each substance in a mixture *has its own properties.*"[33] A mixture can be separated by physical means, like cream from milk. In contrast, a compound's constituent substances are chemically bound and cannot be separated by physical means.

EPA's definition of "mixture" used to designate hazardous substances excludes compounds:

> "Mixture" means any combination of two or more elements and/or compounds in solid, liquid, or gaseous form *except where such substances have undergone a chemical reaction so as to become inseparable by physical means.*[34]

While a mixture may have a compound as a constituent substance, a compound itself is not a "mixture," because a compound by definition is formed by a chemical bond that cannot be separated by physical means. Thus, for purposes of designating hazardous substances under the Clean Water Act (and through it, CERCLA), a compound is not a mixture.[35]

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[30] ATSDR, *Toxicological Profile for White Phosphorus*, § 5.3.2.3.

[31] Third Amended Complaint ¶ 105 ("phosphorus [sic] . . . causes the growth of algae").

[32] *Am. Heritage Dict.* at 892 (emphasis added).

[33] *Sci. Explorer, Grade 7*, at 27.

[34] 43 FED. REG. 10,474, 10,480 (Mar. 13, 1978) (codified at 40 C.F.R. § 116.3) (emphasis added). A copy of the rule is in App. G.

Phosphate is a compound, not a mixture containing elemental phosphorus. Cow manure is a mixture containing phosphate, not a mixture containing elemental phosphorus. When the mixture cow manure is separated by physical means, the constituent substance is phosphate, not elemental phosphorus.

B. Congress and EPA intended the list of hazardous substances to include elemental phosphorus and specifically-named compounds of phosphorus, not all compounds of phosphorus.

As noted above, elemental phosphorus is a listed hazardous substance under CERCLA because it is listed as a hazardous substance under the Clean Water Act and as a hazardous air pollutant under the Clean Air Act. The legislative and regulatory histories of those listings (and the contemporaneous listing of "toxic pollutants" under the Clean Water Act) demonstrate that Congress and EPA intended to list phosphorus in its elemental form, and only those compounds of phosphorus that are specifically listed.

1. Under the Clean Water Act, EPA listed elemental phosphorus and some specific phosphorus compounds, but not all phosphorus compounds.

In the 1972 amendments of the Clean Water Act, Congress directed EPA to list "as hazardous substances . . . such *elements and compounds* which, when discharged in any quantity into or upon the navigable waters of the United States . . . present an imminent and substantial danger to the public health or welfare."[36] EPA promulgated the listing in three steps: an advanced notice of proposed rulemaking, published in 1974;[37] a notice of proposed rulemaking, published in 1975;[38] and a notice of final rulemaking, published in 1978.[39] In all three publications, EPA listed the common name and synonyms of the hazardous substances. It listed "phosphorus" with the synonyms "black phosphorus, red phosphorus, white phosphorus, yellow phosphorus."[40] Each of these names refers to a different allotrope (*i.e.,* crystalline form) of the element phosphorus, not to compounds of phosphorus.[41]

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[35] *See New Castle County*, 769 F.Supp. at 596-97 (holding that a compound is not a mixture, so the plaintiff must show that the compound will decompose and release a listed hazardous substance under conditions normally present at the disposal site).

EPA listed some specific compounds that contain phosphorus (such as phosgene and phosphoric acid).[42] EPA specifically deleted from its proposal other compounds of phosphorus (such as ferric glycerophosphate, ferric phosphate, phosphorus pentaflouride, and sodium phosphate (monobasic)) because they did not pose imminent threats to public health and welfare.[43] Selecting among compounds of phosphorus would have been pointless and irrational if EPA intended the listing "phosphorus" to sweep in all compounds of phosphorus.

Contemporaneous EPA rulemaking confirms that listing "phosphorus" did not include all compounds of phosphorus, such as all phosphates. In the Clean Water Act amendments of 1972, Congress directed EPA to develop a list of toxic pollutants.[44] EPA listed "cadmium and *all* cadmium compounds, cyanide and *all* cyanide compounds, [and] mercury and *all* mercury compounds."[45] Thus, when EPA intended to include all compounds of an element, it said so explicitly.

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[36] 33 U.S.C. § 1321(b)(2)(A) (emphasis added); *see also* 39 FED. REG. 30,466 (Aug. 22, 1974).

[37] 39 FED. REG. 30,466-71 (Aug. 22, 1974). A copy of the advance notice is in App. H.

[38] 40 FED. REG. 59,960-76 (proposed Dec. 30, 1975) (to be codified at 40 C.F.R. §§ 116.1-.4 & Table 116.4). A copy of the proposed rule is in App. I.

[39] 43 FED. REG. 10,474-88 (Mar. 13, 1978) (codified at 40 C.F.R. §§ 116.1-.4 & Tables 116.4 A & B).

[40] 39 FED. REG. at 30,470; 40 FED. REG. at 59,975; 43 FED. REG. at 10,485.

[41] ATSDR, *Toxicological Profile for White Phosphorus*, § 3.2.

[42] 39 FED. REG. at 30,470; 40 FED. REG. at 59,975; 43 FED. REG. at 10,485-86.

[43] 40 FED. REG. at 59,965-96; 43 FED. REG. at 10,479.

Four years later, Congress adopted this vocabulary of explicitly using the term "compounds" when it intended to include on a list of hazardous substances all compounds of an element. After its initial rulemaking, EPA developed an expanded list of toxic pollutants to settle lawsuits filed by environmental groups dissatisfied with EPA's progress in the area.[46] Congress ratified the list[47] and directed EPA to publish it.[48] The published list included 13 entries of "[element] and compounds," such as "Mercury and compounds."[49]

Another set of rulemaking confirms that the listing of "phosphorus" did not include all compounds of phosphorus. When EPA referred to phosphate compounds generically, it used the term "total phosphorus."[50] Shortly after EPA designated elemental phosphorus as a hazardous substance,[51] it proposed to designate total phosphorus (primarily phosphates) as a "conventional pollutant" under the Clean Water Act,[52] which would have subjected total phosphorus to *less stringent* regulation than non-conventional pollutants and *much less stringent* than toxic or hazardous pollutants.[53] EPA's proposal to relax regulation of phosphate directly refutes Waco's claim that in a contemporaneous rulemaking, EPA intended to include all phosphate compounds under more stringent regulation as hazardous substances. Ultimately, EPA decided to continue regulating total phosphorus in the middle tier of non-hazardous, non-toxic, non-conventional pollutants.[54]

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[44] 33 U.S.C.A. § 1317(a) (West Supp. 1973).

[45] 38 FED. REG. 18,044 (proposed July 6, 1973) (emphasis added). A copy of the proposed listing is in App. J. 38 FED. REG. 24,342, 24,344 (Sept. 7, 1973). A copy of the initial final list is in App. K. The rulemakings to list hazardous substances and toxic pollutants should be read together because they were complementary parts of a coordinated regulatory strategy. 42 FED. REG. 10,474 ("The promulgation of this regulation [designation of hazardous substances] is a major component of the Environmental Protection Agency's strategy to regulate the discharge into the Nation's waters of toxic and hazardous substances.").

[46] John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1, 32-33 (1997), hereinafter cited as "Dernbach, *Unfocused Regulation*." *See also Hercules, Inc. v. EPA*, 598 F.2d 91, 101 & n.14 (D.C. Cir. 1978).

[47] Dernbach, *Unfocused Regulation* at 33-34; 33 U.S.C. § 1317(a)(1).

[48] 33 U.S.C. § 1317(a)(1).

[49] 43 FED. REG. 4108, 4109 (Jan. 31, 1978) (codified, as later amended, at 40 C.F.R. § 401.15). A copy of the Federal Register listing is in App. L. Note that the list omits "phosphorus and compounds."

Therefore, EPA's listing of "phosphorus" as a hazardous substance was not intended to include all compounds of phosphorus. Instead, EPA specifically listed the compounds of phosphorus it intended to designate as hazardous substances.

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[50] *See, e.g.*, 38 FED. REG. 28,758, 28,759 (Oct. 16, 1973) (codified at 40 C.F.R. § 136.1-.5 & Table I) (proposing test procedures for total phosphorus). A copy of the adopted rule is in App. M.

[51] 43 FED. REG. at 10,486.

[52] 43 FED. REG. 32,857 (proposed July 28, 1978). A copy is in App. N. Although the rule proposal generally uses the term "phosphorus," EPA specifically noted that in that rulemaking, "[p]hosphorus means total phosphorus as defined at 40 C.F.R. 136 [the test procedures for total phosphorus]," to distinguish it from elemental phosphorus. *Id.* at 32,858. That specific reference distinguishes these facts from *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 988-91 (1st Cir. 1995), where the appellate court held that EPA's test procedures could not help define the scope of the listing "cyanides," because the rules did not use the test to define the term. Here, EPA defined "total phosphorus" with respect to the test.

[53] 43 FED. REG. 32,857 ("Since BCT [best conventional pollution control technology, which applied to conventional pollutants] will always be equal to *or less stringent* than BAT [best available control technology economically achievable, which applied to non-conventional pollutants], BCT may be less protective of water quality." (Emphasis added.)).

[54] 44 FED. REG. 44,501 (July 30, 1979) (list of conventional pollutants codified at 40 C.F.R. § 401.16). A copy of the final rulemaking is in App. O.

2. In the Clean Air Act, Congress listed elemental phosphorus and some specific phosphorus compounds, but not all phosphorus compounds.

The Clean Air Act's list of hazardous air pollutants is the other source for phosphorus being a listed hazardous substance under CERCLA. While considering changes to the Act in the late 1980's, Congress and EPA developed a list of 189 hazardous air pollutants,[55] which Congress enacted into the law.[56] Congress listed "phosphorus" and some specific compounds of phosphorus (such as phosgene and phosphine). It also listed generically all the compounds of 12 elements, as "[Element] Compounds," but phosphorus is not among those elements. Congress even enacted a note explaining that it used "compounds" to designate all compounds of an element.[57] Thus, Congress did *not* intend the bare listing "phosphorus" to include all phosphorus compounds.

3. The conclusion is consistent with the case law.

The conclusion that Congress and EPA intended to list phosphorus in its elemental form — but not all compounds of phosphorus — is consistent with the case law.

In *United States v. Alcan Aluminum Corp.*,[58] *Arizona v. Motorola, Inc.*,[59] and *City of*

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[55] Dernbach, *Unfocused Regulation*, at 41.

[56] 42 U.S.C. § 7412(b)(1).

[57] *Id.* (note immediately following the last-listed hazardous air pollutant, "Selenium Compounds").

[58] 964 F.2d 252, 263 (3rd Cir. 1992) (compounds containing cadmium, chromium, copper, lead, or zinc are hazardous substances due to the generic listings under the Clean Water Act).

[59] 774 F.Supp. 566, 569, 572 (D. Ariz. 1991) (holding that a mixture containing compounds of arsenic, cadmium, chromium, copper, lead, nickel, silver, and zinc is a hazardous substance). Note: all those elements are listed as "[element] and compounds" in the list of hazardous substances. 40 C.F.R. § 302.4.

New York v. Exxon Corp.,[60] the courts held that listings of the form "[element] and compounds" designated all the compounds of the element as hazardous substances, even if the particular compound at issue was not specifically listed. Furthermore, in *Dana Corp. v. American Standard, Inc.*,[61] *United States v. New Castle County*,[62] and *United States v. Serafini*,[63] the courts held that if a compound is not listed as a hazardous substance (or covered by a generic listing), a mixture containing the compound does not contain a hazardous substance, and the defendant is not liable, unless the plaintiff proves that the compound will decompose and release a listed hazardous substance under the conditions normally present at the site.

Waco's bare assertion that cow manure is a hazardous substance is based entirely on manure containing phosphates — a *compound* of phosphorus. However, there is no generic listing of "phosphorus and compounds"; Waco has not shown that the phosphates in manure are listed hazardous substances under CERCLA; and Waco has not asserted (and could not show) that cow manure spontaneously releases elemental phosphorus under the conditions at Lake Waco. Therefore, according to the case law, Waco's claim fails.

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[60] 766 F.Supp. 177, 182-83 (S.D. N.Y. 1991) (holding that any compound containing cadmium, chromium, or lead is a hazardous substance because of the generic listings of "cadmium and compounds," "chromium and compounds," and "lead and compounds" under the Clean Water Act).

[61] 866 F.Supp. 1481, 1501 (N.D. Ind. 1994) (holding defendant not liable for waste that does not contain a listed hazardous substance unless the plaintiff shows the waste would release a listed hazardous substance under the normal conditions of the landfill).

[62] 769 F.Supp. 591, 597-98 (D. Del. 1991) (holding that polyvinyl chloride is not a listed hazardous substance and there is no showing it would release the listed hazardous substance vinyl chloride).

[63] 750 F.Supp. 168, 171 (M.D. Pa. 1990) (defendant not liable because there was no showing the polyvinyl chloride, which is not a listed hazardous substance, would release the listed hazardous substances benzene or hydrogen chloride under the normal conditions at the landfill).

II. Alternatively, the Court should defer to EPA's scientific and regulatory judgment.

As shown above, basic science, the legislative and regulatory histories, and case law establish as a matter of law that both Congress and EPA intended the listing "phosphorus" (and the synonyms "black phosphorus, red phosphorus, white phosphorus, yellow phosphorus") to designate phosphorus in its elemental form, not all compounds of phosphorus and especially not the phosphates naturally present in manure. However, if there is doubt, the Court should refer the determination to EPA.

In *Massachusetts v. Blackstone Valley Electric Co.*, the First Circuit referred to EPA the determination of whether ferric ferrocyanide was included under the Clean Water Act's listing of "cyanides" as a toxic pollutant and, therefore, as a CERCLA hazardous substance.[64] The court held that the listing "cyanides" was ambiguous, in part, because EPA originally listed "cyanide and all cyanide compounds,"[65] but the list adopted by Congress substituted "cyanides."[66] Faced with dueling experts, the appellate court invoked the doctrine of primary jurisdiction, noting that "Congress delegated to the EPA, not to the courts, the authority to administer the CWA toxic pollutant list and the CERCLA list of hazardous substances."[67] The court determined that EPA's determination of such matters lies at the heart of the tasks assigned it by Congress, EPA's expertise could unravel technical facts, and EPA's determination would aid the court. Moreover, referral would promote national uniformity.[68]

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[64] 67 F.3d 981 (1st Cir. 1995).

[65] 38 FED. REG. 24,344.

[66] 67 F.3d at 987-88.

[67] *Id.* at 992. The D.C. Circuit reached a similar conclusion when it upheld EPA's listing of PCBs as toxic pollutants. *Envtl. Defense Fund v. EPA*, 598 F.2d 62, 83-84 (D.C. Cir. 1978) ("EPA, not the court, has the technical expertise to decide what inferences may be drawn from characteristics of related substances and to formulate policy with respect to what risks are acceptable.").

If the Court believes that the listing of black, red, white, and yellow phosphorus may include more than just elemental phosphorus, and if the Court accepts dueling evidence contending whether cow manure is a hazardous substance, then the holding in *Blackstone Valley Electric Co.* deserves to be followed, and the Court should refer the matter to EPA.

National uniformity is especially important in this case because an obligation to manage animal wastes as hazardous substances or hazardous wastes would impose significant costs on the state's agricultural community, putting it at a competitive disadvantage with other exporting states. Furthermore, a decision to characterize animal waste as a "hazardous substance" would have important ramifications for other regulatory programs, such as management of municipal sewage sludge, composting and recycling programs, and state and EPA cost-recovery actions. As the First Circuit noted, Congress assigned such policy-balancing tasks to EPA, not the courts.[69]

CONCLUSION

The common meaning and history of the statutes and regulations pertinent to designating hazardous substances demonstrate as a matter of law that Congress and EPA listed elemental phosphorous — not all compounds of phosphorus — as a hazardous substance. Animal waste is a mixture containing unlisted phosphates, not a mixture containing elemental phosphorus.

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[68] *Blackstone Valley Elec. Co.*, 67 F.3d at 992.

[69] *Id.* (within the authority delegated to EPA to properly weigh all the competing arguments).

A final determination that phosphates are hazardous substances under CERCLA merely because they are compounds of phosphorus would have unreasonable consequences. If animal waste must be managed as a hazardous substance, then so must municipal sewage. The interlocutory orders will limit options and raise costs for farmers and cities without a commensurate environmental benefit.

Most members of the agricultural community manage animal waste properly. Some do not. Designating animal waste as a hazardous substance is an erroneous and costly way to force the few to do what the majority already do.

Therefore, the Court should reconsider and reverse its holding that cow manure is a hazardous substance.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

KAREN W. KORNELL
Assistant Attorney General
Chief, Natural Resources Division

Anthony Grigsby

ANTHONY GRIGSBY
Assistant Attorney General
State Bar No. 08491500

Natural Resources Division (MC-015)
P.O. Box 12548
Austin, Texas 78711-2548
Vox: (512) 463-2012
Fax: (512) 320-0052

ATTORNEYS FOR AMICUS CURIAE,
TEXAS DEPARTMENT OF AGRICULTURE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the persons listed below by the method identified below on this 13th day of October, 2005.

Anthony Grigsby
Anthony Grigsby

By certified mail, return receipt requested:

Roy Lee Barrett
Kerry Haliburton
Enid A. Wade
Naman, Howell, Smith & Lee, L.L.P.
900 Washington, 7th Floor
P.O. Box 1470
Waco, Texas 76703-1470
Counsel for Plaintiff City of Waco

James D. Bradbury
Dan Reed
Jackson Walker, L.L.P.
301 Commerce Street, Suite 2400
Fort Worth, Texas 76102
Counsel for Harold Wayne Parks, Parks Hill Dairy, Tony Beltman, Scenic Ridge Dairy, Paul Van Leeuwen, Andy Van Die, and Triple Dutch Dairy

George T. Shipley
Tynan Buthod
J. Scott Janoe
Baker Botts
One Shell Plaza
910 Louisiana
Houston, Texas 77002
Counsel for Aztex Dairy, Inc., Fred R. Lueck, Sr., and Judy A. Lueck

By certified mail, return receipt requested:

Don Martinson
Alan Moore
Fanning, Harper & Martinson, P.C.
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206
Counsel for Defendants Hidden View Dairy, William N. De Jong, and William C. De Jong

Russell W. King
King Law Offices, P.C.
1523 Lingleville Road, Suite B
Stephenville, Texas 76401
Counsel for Defendants Schouten Dairy, Dennis Schouten, Cornelius T. Schouten, Nicholas Schouten, Joan Schoten, Nancy Schouten, and Linda Schouten

Raymond White
Ryan T. Shelton
Akin Gump Strauss Hauer & Feld, L.L.P.
300 West Sixth Street, Suite 2100
Austin, Texas 78701
Counsel for S Cow 10 Dairy, Tex-S, L.L.C., Bill Schouten, Pete Schouten, M.D. Schouten, and Golden Star Dairy, Robert J. Schouten, Pete Henry Schouten, and Pieter Bakker

Mr. KOUPLEN. In my home State of Oklahoma, our Attorney General has filed a lawsuit, the State of Oklahoma versus Tyson Foods, asserting claims under CERCLA and the Federal Solid Waste Disposal Act, alleging natural resource damages in the Illinois River Watershed is the result of improper application of poultry litter as fertilizer within the watershed. This case is proceeding.

Obviously, these developments are very troubling to farmers and ranchers. If normal animal manure is found, either in the proceeding Waco or Oklahoma case, to be a hazardous substance under CERCLA, then virtually every farm operation in the country could be potentially exposed to liabilities and penalties under the Act. We do not believe Congress ever intended such an outcome.

To be more to the point, if the court decides in favor of the Oklahoma Attorney General, does that mean the entire Illinois River Watershed is a Superfund site? What about my small cow/calf operation? If cow manure is a hazardous substance, am I going to need a special permit and an incinerator to dispose of it? Would I need to utilize special hazardous waste transports to send it to an incinerator? If the phosphates in cow manure and chicken litter are hazardous, what about the phosphates used by people on their lawns? Could every green lawn in this country be considered a Superfund site? What about the natural levels of phosphates found in nature? What about the animals that excrete the phosphates? Would they be considered producers of hazardous substances? On this issue, the science and common sense are in agreement, the life-giving phosphates in manure are not now, nor have they ever been, equivalent to the benzenes and PCBs that CERCLA has been addressing for the last 25 years.

It is disturbing to look at the impact of this litigation. In the Waco case, of the original 14 dairies, only five are left in the case. The others, with one exception, have settled with the city. Although the terms of those settlements are confidential, it is believed that the defendants either stopped operation of their dairies or agreed to the regulatory controls sought by the city. The city has been successful because of the difficulties these small businessmen have in engaging in a legal battle against an entity with almost unlimited resources to litigate.

The State of Oklahoma now put farmers and ranchers in a similar situation. Our Attorney General signed a contingency contract with the same law firm that handled the multi-state tobacco settlement a few years ago. Some of the same local law firms in Oklahoma experienced a financial windfall from the tobacco settlement, including the firm of the former State Attorney General, that reportedly received $30 million in the tobacco settlement claim have signed onto the contingency contract.

The Illinois River Watershed contains a little more than 1 million acres, and in his lawsuit under the CERCLA claim, the Attorney General is demanding damages for the cost to restore, replace, or acquire the equivalent of natural resources, the compensable value of lost services resulting from the injury to natural resources and the reasonable cost of assessing injury to natural resources and the resulting damages in the watershed. The contingency contract signed between the Attorney General and three outside firms entitles them to one-third of all the proceeds.

The domestic livestock industry would be driven out of this country, and the grain industry would be crippled, and farm families and communities would be devastated if animal manure is considered a hazardous waste. Our Attorney General has insisted he can extract damages from the poultry companies without harming the growers——

Mr. GILLMOR. Let me ask you to try to wrap it up.

Mr. KOUPLEN. Yes, okay.

Mr. GILLMOR. We try to stay to under 5 minutes.

Mr. KOUPLEN. In brief, or in closing, let me say that the Oklahoma Farm Bureau, the American Farm Bureau Federation, believe that it is a hazardous road or a dangerous path to go down to have animal manure considered hazardous waste, and we certainly hope that Congress will set a direction to see that this does not happen.

[The prepared statement of Steven Kouplen follows:]

PREPARED STATEMENT OF STEVEN KOUPLEN, PRESIDENT, OKLAHOMA FARM BUREAU ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION

Mr. Chairman and members of the subcommittee, my name is Steve Kouplen. I am president of the Oklahoma Farm Bureau (OFB) and a member of the board of directors of the American Farm Bureau Federation (AFBF), which represents the majority of the beef, hog and poultry producers in the country. Oklahoma Farm Bureau is the largest agriculture organization in our state with more than 162,000 member families. I appreciate the opportunity to address you today on a critical issue to the livestock industry.

I am a cattle rancher from Beggs in Okmulgee County in the eastern part of Oklahoma. I am a cow/calf producer running approximately 250 cows. Quite frankly, I and my colleagues in the industry are greatly concerned at the prospect that animal manure could be regulated as a hazardous waste. Farm Bureau firmly believes that Congress never intended that animal manure be considered a hazardous waste and regulated under the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Yet some people are attempting to get the courts to do something Congress never did. There are other members of the panel that will speak to that issue, but I would like to reinforce our hope that Congress will provide policy direction on this important matter. We ask that you affirm what we believe has been the consistent intent that animal manure is not a hazardous substance under Superfund.

Animal manure has been safely used as a fertilizer and soil amendment by many cultures all over the world for centuries. Where would the organic agriculture industry be without it? However, in recent years, we have seen litigation challenge the use of animal manure as a fertilizer by claiming contamination and damage to natural resources.

There are three lawsuits where CERCLA claims have been made or are being made. The first case, the City of Tulsa versus Tyson Foods, et. al., involved poultry companies with growers in the Lake Eucha watershed. Lake Eucha is a drinking water source for the city of Tulsa. In that case, the U.S. District Court for the Northern District of Oklahoma stated in 2003 that “phosphate is found in all living cells, is safe and is vital to life processes.” Yet the court then said that because phosphate is comprised of dangerous elemental phosphorus, phosphate in animal waste is a hazardous substance under CERCLA. How can phosphate be both life giving on one hand and listed as a hazardous substance on the other? We disagree with the Tulsa court’s ruling as a matter of science and a matter of law. Fortunately, the ruling was later vacated under a settlement agreement and cannot be cited as a legal precedent.

In the second case, the city of Waco versus Dennis Schouten, et. al., litigation was brought by the Texas city against 14 individual dairies in the Lake Waco watershed. The city of Waco is alleging that the phosphorus in cow manure is a hazardous substance. The federal judge in the case has not dismissed the issue. The Waco case is currently in the discovery phase and is expected to go to trial next year. In this connection, I would direct the subcommittee’s attention to an amicus brief filed in this case just last month by the Texas Department of Agriculture. It articulates in a thoughtful, straightforward manner exactly why the law and the science dictate another conclusion.

In my own home state of Oklahoma, our attorney general has filed a lawsuit, the State of Oklahoma versus Tyson Foods, et. al., asserting claims under CERCLA and the federal Solid Waste Disposal Act, alleging natural resources damages in the Illinois River watershed as a result of the improper application of poultry litter as fertilizer within the watershed. This case is proceeding.

Obviously, these developments are very troubling to farmers and ranchers. If normal animal manure is found, either in proceeding Waco or Oklahoma case, to be a hazardous substance under CERCLA, then virtually every farm operation in the country could be potentially exposed to liabilities and penalties under the act. We do not believe Congress ever intended such an outcome.

To be more to the point, if the court decides in favor of the Oklahoma attorney general, does that mean the entire Illinois River watershed is a Superfund site? What about my small cow/calf operation? If cow manure is hazardous substance, am I going to need a special permit and an incinerator to dispose of it? Would I need to utilize special hazardous waste transports to send it to the incinerator? If the phosphates in cow manure and chicken litter are hazardous, what about the phosphates used by people on their lawns? Could every green lawn in this county be considered a Superfund site? What about the natural levels of phosphates found in nature? What about the animals that excrete the phosphates? Would they be considered producers of hazardous substance? On this issue, the science and common sense are in agreement. The life-giving phosphates in manure are not now, nor have they ever been, equivalent to the benzenes and PCBs that CERCLA has been addressing for the last 25 years.

It is disturbing to look at the impact of this litigation. In the Waco case, of the original 14 dairies, only five are left in the case. The others, with one exception, have settled with the city. Although the terms of those settlements are confidential, it is believed that the defendants either stopped operation of their dairies or agreed to the regulatory control sought by the city. The city has been successful because of the insuperable difficulties these small businessmen have in engaging in a legal battle against an entity with almost unlimited resources to litigate.

The state of Oklahoma has now put farmers and ranchers in a similar situation. Our attorney general signed a contingency contract with the same law firm that handled the multi-state tobacco settlement a few years ago. Some of the same local law firms in Oklahoma that experienced a financial windfall from the tobacco settlement, including the firm of a former state attorney general that reportedly received $30 million dollars in the tobacco settlement, have signed on to the contingency contract.

The Illinois River watershed contains a little over one million acres. In his lawsuit under the CERCLA claim, the attorney general is demanding damages for the cost to restore, replace or acquire the equivalent of natural resources, the compensable value of lost services resulting from the injury to natural resources and the reasonable cost of assessing injury to the natural resources and the resulting damages in the watershed. A contingency contract signed between the attorney general and three outside law firms entitles the three firms to 33— percent of any monetary damages received in the suit by judgment or settlement and 33— percent of the value of any injunctive relief obtained. Those damages, however, are just for one watershed. The attorney general has threatened legal action in other eastern Oklahoma watersheds. If the attorney general is successful in this lawsuit, it could create an avalanche of copycat litigation across the nation. The domestic livestock industry would be driven from this country, the grain industry would be crippled and farm families and communities would be devastated.

Our attorney general has insisted he can extract damages from the poultry companies without harming the growers and the industry. What he doesn't understand is that poultry companies and poultry growers depend on one another. If the companies determine they must relocate to stay in business, the growers will be left with empty barns and millions of dollars in mortgages they cannot pay.

Our attorney general has said several times in public meetings that it is appropriate for consumers to pay a few more cents for chicken so that the poultry companies can pass through those extra cents for environmental clean-up. That is a shortsighted view, and it shows very little appreciation for the world market economy in which we all compete. This CERCLA litigation has those of us involved in livestock production worried about our future economic viability.

If you look past the sensationalism, you can see that there are already mechanisms in place to address environmental concerns. Those mechanisms can work— when they are properly funded, when they are given the time to work and when they are not ignored by those engaged in a litigious frenzy.

The state of Oklahoma has required animal waste management plans for poultry feeding operations since Jan. 1, 1999, or June 1, 1998, if the poultry feeding operation was in a "threatened" watershed. The plans are based on a phosphorus index adopted by our state USDA Natural Resources Conservation Service. The state of Arkansas requires that producers must have their nutrient management plans implemented by Jan. 1, 2006; it should be noted that many poultry companies required their growers to have nutrient management plans before the state of Arkansas made it mandatory.

States can address issues of shared concern through interstate compacts, as pointed out by Arkansas Attorney General Mike Bebee in the petition he filed before the U.S. Supreme Court earlier this month. In fact, in the "Statement of Joint Principles and Action," signed by representatives of Arkansas and Oklahoma in December 2003, the states agreed to work together in a partnership, acting through their environmental agencies, with the Arkansas-Oklahoma Arkansas River Compact Commission toward the goal of producing a watershed plan, meaning a Clean Water Act 319 plan. To my knowledge, the state of Oklahoma has not pursued a joint watershed plan, although watershed groups are organizing in Arkansas. However, the state of Arkansas has followed through with its commitment to pass regulations for nutrient management, per the 2003 agreement.

The poultry companies have made offers to move so-called excess litter out of certain watersheds in Oklahoma, but those offers have been rejected by our attorney general.

There are a couple of issues that have been overlooked in the Oklahoma litigation. The first issue is that no administrative actions have been brought against the poultry growers and the companies by the state regulating agency or by EPA. To my knowledge, the poultry growers in the Illinois River watershed have not violated the Oklahoma poultry feeding operation statutes. Oklahoma's poultry operators, as most producers across the nation, understand that they must comply with the Clean Water Act and its regulations. They understand that they are liable for discharges not properly permitted under the Clean Water Act.

The second issue that has been overlooked in the Oklahoma litigation is the fact that the poultry growers own their litter. If the growers lose the use of their litter, they will be economically damaged. You might wonder why the Oklahoma attorney general didn't file CERCLA claims against the poultry growers in the Illinois River watershed. Perhaps it's because it would be politically unpopular to sue farmers. Also, poultry growers don't have the deep pockets that can be so attractive to law firms working on a contingency basis.

Speaking for those of us involved in livestock production, we need Congress to act. We are not asking to be excused from meeting our environmental responsibilities under the Clean Water Act or any other applicable federal law or regulation—we are meeting them. We are simply asking Congress to clarify what some of us felt was quite clear from the beginning—animal manure is not considered a hazardous waste under CERCLA. We believe Congress never intended for animal manure to be regulated under CERCLA. Congress needs to reaffirm this now. We need some common sense that will protect us from those who would litigate us out of business. Thank you for attention. I would be happy to answer any questions.

Mr. GILLMOR. Thank you very much. Next, the Chair would like to recognize Robert Connery if the Chair can find him behind the pile of paper. Mr. Connery.

STATEMENT OF ROBERT CONNERY

Mr. CONNERY. Thank you, Mr. Chairman. And I would like to supplement my written testimony that has been accepted to the record with a letter to the chairman and ranking member on behalf of some 20-some agricultural organizations stating their position on the legislation that has been introduced by Representative Hall, if it could be——

Mr. GILLMOR. That's a letter to me and Ms. Solis. Without objection?

Mr. CONNERY. Thank you.

Mr. GILLMOR. So hearing none, so ordered.

[The information referred to follows:]

November 16, 2005

The Honorable PAUL E. GILLMOR
Chairman
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable HILDA L. SOLIS
Ranking Member
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

DEAR MR. CHAIRMAN AND MADAM RANKING MEMBER: Over the past couple of years, some state and local authorities have sought to extend Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 liability to our nation's livestock and poultry operations for emissions or discharges from manure produced in those operations. We do not believe such an interpretation is supported either by the science or legislative history. Because of these challenges, however, Congress must confirm that it never intended to regulate manure under CERCLA or EPCRA. Without such clarification, every livestock or poultry operation; or agricultural field or organic farming operation on which manure or manure compost is spread for fertilizer in this country could be subject to comprehensive and highly regulated cleanup under Superfund law.

CERCLA was created to provide for cleanup of the worst industrial chemical toxic waste dumps and spills such as Love Canal and Times Beach. To this end, Congress created the Superfund to tax industries that create or utilize substances (such as petrochemicals, inorganic raw chemicals and petroleum oil) used to make all hazardous products and waste. Manure is clearly not among these materials. When enacted, the fee was levied on these chemicals when "sold" or "used" by a "manufacturer, producer or importer" which again do not apply to livestock or poultry operations. In addition, the definition of "release" under CERCLA specifically exempts "the normal application of fertilizer". Because manure is beneficially recycled as a fertilizer, it fits squarely within this exemption.

EPCRA was adopted in the wake of the 1984 Union Carbide disaster in Bhopal, India to force reporting of releases of hazardous chemicals and to enable emergency response from governmental authorities when appropriate. In EPCRA, Congress specifically exempted "Any substance to the extent that it is used in routine agricultural operations or is fertilizer held for sale by a retailer to the ultimate customer' from the definition of hazardous chemical. Again, because manure is used as a fertilizer, it fits squarely within this exemption.

Recently, municipal and state governments filed suit against livestock and poultry operations claiming Superfund liability in Texas and Oklahoma, arguing that manure is hazardous. If these two cases are successful, the effect will essentially be the outlawing of the use of manure-based fertilizer in this country. Livestock and poultry owners and operators, and perhaps financial lenders, simply will not be willing to accept CERCLA and EPCRA liability for manure.

The animal agriculture industry has been regulated appropriately for years under the Clean Water Act, Clean Air Act, and various state laws to protect the environment. They have never been regulated under Superfund or EPCRA. It is unfair to require that even if animal agriculture does everything it can to protect the environment under the Clean Water Act, Clean Air Act and state laws, it may still be held liable under CERCLA or EPCRA.

Livestock and poultry operators do not operate Superfund sites, and manure is not a Superfund waste. Fields on which manure is spread are not Superfund sites either.

We urge Congress to confirm that it never intended to regulate manure under Superfund by supporting the attached legislation introduced by Representatives

Ralph Hall and Roy Blunt specifically excluding manure from such regulation. Also attached is a section-by-section analysis of the legislation.

Sincerely,

NATIONAL CATTLEMEN'S BEEF ASSOCIATION; TEXAS ASSOCIATION OF DAIRYMEN;
COUNCIL OF NORTHEAST FARMER COOPERATIVES; CONTINENTAL DAIRY PRODUCTS,
INC.; NATIONAL COUNCIL OF FARMER COOPERATIVES; DAIRY PRODUCERS OF NEW
MEXICO; NATIONAL TURKEY FEDERATION; SELECT MILK PRODUCERS, INC.;
NATIONAL CHICKEN COUNCIL; ALLIED FEDERATED CO-OPS, INC.; NATIONAL PORK
PRODUCERS COUNCIL; IDAHO DAIRYMEN'S ASSOCIATION; AMERICAN FARM BUREAU
FEDERATION; CALIFORNIA DAIRIES, INC.; DAIRY FARMERS OF AMERICA; UTAH
DAIRYMEN'S ASSOCIATION; UNITED EGG PRODUCERS; MISSOURI DAIRY ASSOCIATION;
NATIONAL MILK PRODUCERS FEDERATION; AGRI-MARK, INC.; ST. ALBANS
COOPERATIVE CREAMERY; DAIRYLEA COOPERATIVE, INC.; OREGON DAIRY FARMERS
ASSOCIATION; UPSTATE FARMS COOPERATIVE, INC.; AND THE WASHINGTON STATE
DAIRY FEDERATION.

Mr. CONNERY. I represent the National Cattlemen's Beef Association, and I am not going to pretend to know everything about everything that has been discussed here. But, what I have over there on that TV monitor is a picture of a cattle feeding operation. That cattle feeding operation is the very largest in this country. It has 150,000 cattle.

Cattle feeding operations feed cattle that are generally raised elsewhere. What you see there is manure in those lots, and you see in the background a sprinkler keeping the dust down. This kind of operation does not have what is referred to as a lagoon. They have surface runoff, and surface runoff into those ponds can have trace amounts of manure—in them. The two pollutants that you have focused on that have been subject of all the concern and discussion that I know about are ammonia and hydrogen-sulfide. Those two pollutants come from this kind of operation. Certainly ammonia does.

The ammonia comes from the—a little bit of potty talk here—the defecation, urination, the deposit of manure, and the key—the issue before you is whether or not Superfund regulates or should regulate manure. Manure doesn't have ammonia in it. Manure doesn't have hydrogen-sulfide in it. It is the bacterial decomposition of that, as well as nitrogen in soils. As you may know, half the national inventory of ammonia comes from soils and bio-mass. So you—we are talking about pollution, if you will, that is produced by natural and biological processes. The issue you are talking about is whether to subject this to Superfund, whether to attack Superfund liability to manure. And that has enormous implications.

Attaching Superfund liability means that there will be joint and several—strict liability, retroactive liability, maybe imposed by order, as to which there is no judicial review, and troubled damages It is the heaviest artillery of the—in the arsenal, and was intended only for the most serious cases where the Clean Air Act and the Clean Water Act and the Resource Conservation Recovery Act, and the Toxic Substance Control Act, and FEFRA, and all the other laws that apply were inadequate and nothing else would work. When all of those had failed, then you were supposed to apply Superfund because nothing else was going to do the job. Well, I submit to you that this is not Hooker Chemical. This is not Love Canal. This is not Times Beach. And that the application of laws of that magnitude without a showing that there is a serious problem from this—certainly, the one I know about, the kind of cattle operation. I think it is a serious issue and that you need to address it.

Now, these cattlemen asked me whether or not these laws applied to them. They didn't ask me to come here and simply say—tell them it doesn't apply. Well, I looked at it. I spent months looking at it, reading every hearing, every Legislative Committee report, every law, every—all the—everything I could find. And all it talked about on the Superfund was synthetic, man-made, manufactured, produced chemicals. It never talked about natural or biological processes or this kind of waste. As you heard, EPA has never done that. Only very recently have people thought about it and suits been brought over whether or not it applies. Well, I looked at it and it talks about facilities that release hazardous substances into the environment. Well, those don't comfortably or clearly fit defecation, urination, breakdown of manure. I don't think they clearly do.

So you look at the legislative history and you find that—does it mention agriculture at all? Could they have intended it to apply to animal waste? Could they have intended it to apply to cattle operations without even mentioning it? Without even providing for the financing of it? They tax petroleum and chemicals and they talked about chemical feed stocks. They thought about taxing ammonia, but they said ammonia will not be taxed when it is used for agricultural purposes or as a nutrient. So they thought about it. And in every case where they thought about it, they did not apply it.

The thing that I want to mention that it has mentioned that there is no exemption for it, I think there is an exemption. I don't think it was intended to apply to begin with, but there is an exemption from response action for naturally occurring releases and—here, this is from the Senate history—such as "diseases or contamination resulting from animal waste, e.g. beaver excrement"—I don't know why they gave that example—"are excluded from the Response Program. Naturally occurring substances"—there is more to that. It is complicated. I don't have time to g into it. But that exemption is in there, and it is said in the legislative history that it doesn't apply to animal waste, that it does apply—the exemption applies. So that—the normal application of fertilizer, the natural application of pesticides, that—to say that manure is covered, I think, is a stretch if you fairly look at the intention of the legislation.

The second thing I want to cover has to do with the——

Mr. GILLMOR. You need to wrap up. You are going over the time limit.

Mr. CONNERY. I am sorry, my apologies. What I have in front of me, the second topic I had wanted to address, was simply the adequacy of existing law to deal with this, which is what you really need to show the inadequacy of it before you apply. This green volume is the Pollution Prevention Program for one CAFO in Texas. This is what is required now for every CAFO that discharges what it is not allowed to discharged now—water and into the waters of the United States. These will become nutrient management plans that every significant discharger will have to have.

Which, the other things in front of me are the State laws that apply to CAFOs. I would contend, and would be happy to discuss with you, the adequacy of those laws to do the job for manure. Thank you.

[The prepared statement of Robert T. Connery follows:]

PREPARED STATEMENT OF ROBERT T. CONNERY ON BEHALF OF THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION

Honorable Ladies & Gentlemen of the Subcommittee, my name is Robert T. Connery, appearing on behalf of the National Cattlemen's Beef Association ("NCBA") to discuss the application of the existing Superfund Laws to manure from cattle operations, and the need, in view of pending and threatened litigation, to clarify that those laws do not apply to manure from cattle operations. In particular, this testimony will address:

- The lack of any demonstrated need to cover manure from cattle operations as a "hazardous substance" under the Superfund laws.
- The adequacy of existing environmental laws other than the Superfund laws to adequately regulate and control any potential adverse effects from manure from cattle operations.
- The purpose of Superfund laws, fairly construed, to control synthetic, man-made, manufactured and produced chemicals, and hazardous wastes from modern chemical technology, not naturally-occurring substances such as manure from cattle operations.
- As a matter of sound legislative policy and common sense, (1) the rejection of Superfund's application to manure and (2) the reasonable requirement for a substantial showing to Congress of a severe toxic or hazardous problem from manure from cattle operations and other forms of animal agriculture before imposing the most coercive, burdensome and inequitable of the nation's environmental laws on America's cattle ranching and feeding operations.

I. BACKGROUND

Livestock and other animal agricultural operators face growing concerns about potential CERCLA and EPCRA liability for emissions or discharges from manure produced in their operations. Congress, we respectfully submit, should clarify that it never intended to regulate manure under CERCLA or EPCRA. The "hazardous substances" that present issues regarding CERCLA and EPCRA applicability to livestock operations are ammonia and hydrogen sulfide.

"Cattle Operations" include operations that raise and feed cattle in open pastures and in open-air cattle feed lots. Grazing of cattle in open pastures is usually in fenced areas, and most feeding operations take place in fenced pens. Precipitation runoff from pastures and cattle feedlot surfaces is usually contained in runoff retention ponds. The precipitation runoff retention ponds that are part of Cattle Operations may, as described below, contain minor amounts of manure and urea from runoff, and as a result may produce some ammonia and hydrogen sulfide. These ponds are not waste lagoons, nor are they waste treatment facilities. The precipitation runoff retention ponds at Cattle Operations may contain small amounts of sulfur from the trace amounts of urea and manure reaching them as a result of precipitation runoff from pens. This sulfur originates in the soils and plants, grains and other feedstuffs, and in some cases, supplements, on which the cattle are fed. The sulfur in the ponds may produce some amounts of hydrogen sulfide by virtue of anaerobic decomposition. However, precipitation runoff retention ponds at Cattle Operations are designed to be aerobic, not anaerobic. Thus little, if any, hydrogen sulfide is expected to be generated from these ponds.

The natural breakdown of nitrogen in grass and other feeds (primarily corn, but also including wheat, sorghum, and other grains and foods) during digestion by cattle results in some ammonia in flatulence, belching and exhalation. In addition, the bacterial decomposition of manure and urea excreted by cattle in pastures and feed pens produces ammonia over the weeks and months after it is excreted.

NCBA's exhaustive review of the statutes themselves, their legislative history, and their interpretation by EPA and the courts over the course of more than 20 years, discovered no mention or indication that substances resulting from flatulence, belching, exhalation, or excretion of urine or manure or their bacterial decomposition, or substances resulting from runoff that encounters and carries relatively small amounts of manure or urea into precipitation runoff retention ponds are covered by CERCLA or EPCRA. The terms of the statutes themselves, which cover "facilities" that "release" "hazardous substances" into the environment (discussed below) do not clearly or comfortably cover the biological and natural processes that result in ammonia and hydrogen sulfide at Cattle Operations. It is not a matter of broad or narrow reading of the terms of the statute, but whether those terms cover the biological and natural processes responsible for generation of ammonia and hydrogen sulfide at Cattle Operations at all. Such coverage is, NCBA believes, ambiguous at best, while the exception for "naturally occurring substances," 42 U.S.C.A. § 9604(a)(3)(A) (discussed below) does seem to cover those processes.

II. PURPOSE AND INTENT OF CERCLA

CERCLA was passed in the wake of Love Canal for the purpose of dealing with the "legacy of hazardous substances and wastes which pose a serious threat to human health and the environment." S. Rep. No. 99-73, at 12 (1985), and "to clean the worst abandoned hazardous waster [sic] sites in the country . . ." H.R.Rep. No. 99-253, Part 5, at 2 (1985). The legislative history contains a litany of references to "synthetic," "man-made" chemicals, "chemical contamination," and the results of "modern chemical technology" as the problems CERCLA intended to address. S. Rep. No. 96-848 at 2-6, 12 (1980); S.Rep. No. 99-11 at 1-2 (1985); S. Rep. No. 99-73, at 12 (1985); H.R. Rep. No. 99-253, part 5, at 2 (1985). It contains no reference to an intention to clean up manure or urea, or their byproducts, from cattle or any other animal agricultural operations.

In addition to clean-up of hazardous waste sites such as Love Canal, the Senate committee stated that the legislation was intended to cover "spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health." S. Rep. No. 96-848, at 5 (1980) and commented that such releases have resulted in the "loss of livestock and food products to contaminated drinking water and feed . . ." *Id.* It also noted that Superfund "may be used to compensate an agricultural producer . . . for loss" resulting from such releases of hazardous substances" *id.* at 78, and that such losses included injury to "livestock" *id.* at 79. Livestock operations were viewed as needing protection, not as a source against which others might need protection.

Congress also indicated the scope of the activities it intended to cover in the provisions it made for funding the "Superfund" to pay for cleanup. The tax it imposed focused on "the type of industries and practices that have caused the problems that are addressed by Superfund;" Congress chose to impose the tax "on the relatively few basic building blocks used to make all hazardous products and wastes." H.R. Rep. No. 99-253, Part 1, at 141 (1985); S. Rep. No. 96-848, at 19 (1980). These building blocks, or chemical "feedstocks," are comprised of petrochemicals, inorganic raw materials, and petroleum oil because "virtually all hazardous wastes and substances are generated from these [substances]." *See id.* at 20; *see also* S. Rep. No. 99-73, at 3 (1985) ("The taxable chemical feedstocks generally are intrinsically hazardous or create hazardous products or wastes when used."); H.R. Rep. No. 99-253, Part 1, at 141 (1985). ("[T]he problems addressed by CERCLA are byproducts of productions processes that use these raw materials."). Manure, urea, and their byproducts, are clearly not among these materials.

The taxation provisions of CERCLA also indicate that substances like ammonia, when used for agricultural purposes, are not covered within the scope of CERCLA. Specifically, "nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, . . . [or] when used as a nutrient in animal feed," are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); *see also* S. Rep. No. 99-73, at 9 (1985). The exemption is based largely on the premise that "taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which appears to be unnecessary." *Id.* Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would constitute an "unnecessary burden" on Cattle Operations.

III. RELEVANT EXEMPTIONS FROM CERCLA.

In EPCRA, Congress, recognizing that "CERCLA response authorities are extremely broad . . ." excluded from the scope of the federal response authority the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 104(a)(3)(A); *and see also* S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA's response authority, noting that naturally occurring releases, such as "diseases or contamination resulting from animal waste (e.g. beaver excrement)," are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena, are excluded from EPA's response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA's response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely "where it is naturally found," i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The precipitation and surface runoff affecting them are naturally occurring processes. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The "normal application of fertilizer" is separately excluded from the definition of CERCLA "releases". 42 U.S.C.A. § 101 (22).

Some might argue that livestock are not "naturally" contained within fenced pens or in the large numbers involved in modern Cattle Operations. However, this ignores that the CERCLA exemption is directed at whether the *substance* is naturally occurring, not at the context or circumstances in which the substance might be released.

For reasons that apply with equal force to livestock operations, EPA has exempted from release reporting under CERCLA several substances that are not considered to present risks that warrant regulation under CERCLA. The agency has found reporting of such releases not to be consistent with the purposes of CERCLA release reporting:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require "notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion." [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist."

54 Fed. Reg. 22524, 22528.

Based on this interpretation, EPA exempted release of "naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction." *Id.*

With respect to disturbance of large areas of land, such as farming that caused releases of "reportable quantities" of radionuclides, EPA concluded that those "activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted "the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers." *Id.* EPA explained that it did so because "the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles *may not be consistent with the purposes of the section 103 reporting requirement*." *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

> "will always be emitted continuously at low levels spread over large areas' [and] "never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released."

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance "to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2. It stated its authority to do so as follows:

> CERCLA sections 102(a), 103, and 115 together provide EPA with authority to grant administrative reporting exemptions. Such exemptions may be granted for

> releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate. Requiring reports of such releases would serve little or no useful purpose and could, instead, impose a significant burden on the Federal response system and on the persons responsible for notifying the Federal government of the release. Through such reporting exemptions, therefore, the Federal response system is able to more efficiently implement CERCLA and EPCRA and more effectively focus on reports of releases that are more likely to pose a significant hazard to human health and the environment.

63 Fed. Reg. 13460 (Mar. 19, 1998).

EPA's interpretation of the scope of the naturally occurring substance exemption, and its authority to broaden it to cover other activities where response action is inappropriate, infeasible and unnecessary, have evident application and relevance to Cattle Operations. As noted above, manure is the kind of naturally-occurring substance Congress intended to exempt from CERCLA. And like radionuclides from golf courses, real estate development or mining, and utility coal piles, CERCLA response actions would be neither appropriate nor practical respecting emissions related to manure.

The references to agriculture in the legislative history refer to Cattle Operations as a resource to be protected and compensated for loss rather than as operations which are a source of hazardous wastes to be regulated. To the extent there is mention or explicit treatment of agricultural activities or livestock, it is to exempt activities such as the "normal application of fertilizer," 42 U.S.C. 9601(22)(D), and the reporting of "the application of a pesticide produce registered under Federal Insecticide, Fungicide, and Rodenticide Act," 42 U.S.C. 9603(e). Normal agricultural activities were not intended to be covered under CERCLA. The legislative history of the fertilizer application exemption reflects Congressional awareness that chemical fertilizers did contain hazardous substances, but exempted them in normal use in agriculture. If it were the intent of Congress to make manure subject to CERCLA while it is located at livestock feeding operations, it would be anomalous for Congress to have exempted the CERCLA-regulated manure when it is located on croplands and used for fertilizer.

IV. CONGRESS SHOULD CONSIDER THE ADEQUACY OF EXISTING ENVIRONMENTAL LAWS BEFORE APPLYING THE EXTRAORDINARY REMEDIES OF SUPERFUND LAWS.

Cattle and other animal agriculture operations are subject to a vast array of federal, state and local environmental laws and authority to deal with every conceivable environmental problem presented by them. They include the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, FIFRA, soil conservation, dust and odor control, as well as nuisance laws, apply broadly throughout the country to provide environmental protection from every conceivable aspect of cattle and animal agricultural operations. For example, under the Clean Water Act, all concentrated feeding operations (CAFOs) are required to obtain an NPDES permit if they discharge to waters of the United States. Discharges to water from beef cattle CAFOs are prohibited, with a limited exception for overflow from properly designed and constructed retention ponds during extraordinary rainfall events. CAFOs must comply with best management practices for land application of manure and prepare nutrient management plans. 40 C.F.R. Sections 122.21, 122.23, 122.42, Part 412. There has been no indication that environmental laws such as these are inadequate.

The Superfund Laws, by contrast, were adopted for the most serious and drastic environmental problems where all other environmental laws had proved inadequate, and extraordinary remedies were called for. Superfund provides strict (no showing of wrongdoing, fault, or negligence), joint and several (an insignificant contribution [one-quarter of one percent]) can make any contributor liable for the entire cleanup), retroactive (exposure exists for activities that were legal at the time) liability, that may be imposed by unilateral order from EPA that is not subject to judicial review and carries treble damages for failure to comply. Could Congress have intended to impose such liability on the hundreds of cattle operations across America's heartland without even mentioning them? Of course not. In fact, in every instance where possible application of Superfund laws to biologic and natural process was discussed, Congress was clear to exclude those processes. That has not been enough to prevent litigation over applying the Superfund Laws to manure from animal agriculture, and decisions that they apply. We hope Congress will determine that such operations do not warrant the drastic and coercive remedies of Superfund and clarify that in an amendment excluding manure from animal agriculture as a CERCLA hazardous substance.

V. COMMON SENSE AND LEGISLATIVE POLICY AND JUSTIFICATION.

NCBA submits that a mere common sense consideration of the natural and biologic processes involved with cattle raising and feeding, and the recycling of the manure that results, are not and should not be within the purview of the Superfund Laws. Those laws were intended to apply when all else failed. All else has not failed in the regulation of cattle operations. Congress, we suggest, should require more than unproven assertions and suggestions prior to imposing the extraordinary, coercive remedies of CERCLA on farming, ranching and cattle feeding. There should, we strongly suggest, be a very substantial showing of a national problem of toxic and hazardous proportions in order to justify the imposition of government's most drastic powers on its tens of thousands of cattle operations.

VI. CONCLUSION

In conclusion, NCBA believes that the Superfund laws, when read fairly and in accordance with their purposes and consistent with the other provisions of the statute, were not intended to apply to manure from Cattle Operations However, even if the Superfund laws were intended to apply to cattle and other animal agriculture operations in some cases, NCBA believes that ammonia and hydrogen sulfide from Cattle Operations either fall within the naturally-occurring substances exemption from EPA's response authority, or fit the criteria under which EPA has exempted other activities from release reporting requirement because response action is not appropriate or feasible, such as releases of reportable quantities of radionuclides from mines, farming and land disturbance or releases from the dumping of coal and coal ash at facilities with coal-fired boilers. Releases of these substances from manure at livestock operations are not like the chemical releases that CERCLA was intended to address and do not present the type of health risks that warrant CERCLA cleanups. Even if manure emissions did present a significant risk, a CERCLA response action would not be a feasible or practical method of mitigating the risk.

We thank the Subcommittee for its consideration of NCBA's comments and position.

Mr. GILLMOR. Thank you very much, Mr. Connery. Now we will go to John Starkey.

STATEMENT OF JOHN STARKEY

Mr. STARKEY. Thank you, Mr. Chairman. My name is John Starkey. I am Vice President, Environmental Programs, at U.S. Poultry and Egg, and I am making this presentation today on behalf of National Chicken Council, National Turkey Federation. I thank you for the opportunity to present testimony outlining the environmental practices of our Nation's approximately 35,000 broiler and turkey growers, their impact on air and water media, the regulation of these farms under media specific laws such as Clean Air Act, and the confusion and problems caused by the attempts of some to apply the CERCLA/EPCRA requirements to these facilities' norms.

Broiler and turkey production in this country is almost exclusively a family owned, family operated small farm enterprise. We conducted a survey in 2001 where we focused on farm size and litter management techniques at those farms, and found that—and the data is actually in the—in my written testimony—but found that the growers were already using litter, in 2001, at an agronomically and environmentally sound rate.

For the poultry grower, there are five tiers of regulation or oversight that they have to look at to make—to ensure they have the agronomic use of litter. The first tier is a Federal tier, the CAFO permit. A discharger would require such a permit. The Second tier, as Mr. Connery just alluded to, is an extensive network of State regulations. The third tier, based on what is surprising, integrates us today in your contract require that the grower have a nutrient management plan. The fourth tier is the bank also requires—the lending institution for the facility also requires that you have a developed and implemented nutrient management plan to ensure the continuation of your loan. And then finally, in watersheds with a water quality impairment, EPA has provided those states under the Clean Water Act a total maximum daily load program, which will holistically address the contributors to a specific water quality problem.

Recently, of course, CERCRA and EPCRA has been utilized in the alleged release of phosphorous and litter in a particular watershed, which was the sole cause of water pollution concerns. Those conflict with the facts. In virtually any State that you want to look at, there is commercial fertilizer is eight times greater than in all the litter in that state, and about five times more phosphorous in commercial fertilizer than in poultry litter in major poultry states.

And I am not trying to condemn or attack agricultural fertilizer users, but I am trying to expose a fallacy and ultimately the failure of attacking only one nutrient source in addressing these watershed nutrient issues, rather than using the TMDL Program that Congress provided in the Clean Water Act.

On the Clean Air Act's side, there has been allegations as well that we are not complying with the Clean Air Act, or the reporting requirements of CERPRA and EPCRA. Quite equivocally, I can say broiler and turkey farms are not violating Clean Air Act permitting requirements or standards.

The natural breakdown of organic nitrogen, again, as was alluded to a moment ago, in poultry litter, can create ammonia. But, right now, the facts are that given the uncertainty of the available data, the day-to-day variation on a farm, you start off with a bird that doesn't weigh anything. You end up with a bird that weighs five pounds. You have an awful lot of variability: temperature, ventilation, a whole lot of things. It is impossible for a farmer to know, or a grower to know, on a specific day, did or did not, he go over 100 pounds of ammonia.

Now, if a farmer does know, then he has to control ammonia in the house, because broilers and turkeys are more sensitive to ammonia than humans are. And so we have an extensive ventilation system that would exhaust the house, and in doing so, the ammonia levels that are there should—and, actually, if you use one of the EPA models for modeling air pollution releases, a release of 100 pounds per day, our reporting threshold, would result in the concentration of about 1 part per million of ammonia 100 feet away from the house, and the occupational standard for 8-hour exposure standard for ammonia is 50 parts per million.

I guess, just kind of to wrap up, if—you know, so, if you look at that level, 50 parts per million is the occupational standard, one part per million is going to be the actual concentration 100 feet away from the houses. There is not going to be a response from the Emergency Response Center to that type of release, and also it is well below—obviously, well below the human health standards that are established for ammonia. So we ask the—we ask you to support the legislation introduced by Congressman Hall. Thank you.

[The prepared statement of John E. Starkey follows:]

PREPARED STATEMENT OF JOHN E. STARKEY, VICE PRESIDENT-ENVIRONMENTAL PROGRAMS, U.S. POULTRY AND EGG ASSOCIATION ON BEHALF OF THE NATIONAL CHICKEN COUNCIL, NATIONAL TURKEY FEDERATION, AND U.S. POULTRY AND EGG ASSOCIATION

Good afternoon. My name is John Starkey, and I serve as Vice President—Environmental Programs for the U.S. Poultry & Egg Association (USPOULTRY). I am making this presentation on behalf of the National Chicken Council (NCC) and the National Turkey Federation (NTF). It is an honor to have this opportunity to present this testimony outlining the environmental practices, procedures, regulations and impact of our nation's approximately 35,000 broiler and turkey growers.

By way of introduction, USPOULTRY is a trade organization dedicated to three tenets—research, education and communication. For example, USPOULTRY was a founding member and partner with EPA, USDA and TVA in the Poultry Water Quality Consortium. We sponsor the International Poultry Exposition each year, the world's largest poultry and egg trade show with approximately 20,000 attendees. We provide numerous industry-wide training classes in industry-specific terms for poultry wastewater treatment facility operators, and HAACP, a program to further enhance food safety. We offer seminars on virtually every aspect of poultry production and processing, including an annual environmental management seminar. We award grants for approximately $1 million/year in poultry related research. These grants have included almost $2 million in environmental research related to poultry production and processing in recent years; much of this research is being used today as the basis of enhanced nutrient management efforts such as the inclusion of phytase to poultry feeds to enhance phosphorus utilization. We sponsor the Family Farm Environmental Excellence Award and the Clean Water Award, awards designed to recognize exemplary environmental stewardship at poultry farms and at processing facilities, respectively. Our membership consists of integrators, processors, producers and allied industries in all poultry (broiler, duck, layers, turkeys) species.

USPOULTRY works very closely with our industry's Washington-based commodity trade organizations, National Chicken Council and the National Turkey Federation, to ensure the research, education and technology needs of our industry are met.

The National Chicken Council is a nonprofit member organization representing companies that produce and process over 95 percent of the broiler/fryer chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry.

The National Turkey Federation is the national advocate for all segments of the turkey industry. NTF provides services and conducts activities which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products.

Today, I am going to address some of the environmental practices at broiler and turkey farms and their impact on air and water media; the regulation of these farms under media specific laws such as the Clean Air Act and Clean Water Act, and the confusion and problems caused by the recent application of CERCLA/EPCRA requirements, heretofore reserved for industrial facilities, to farms, despite exceptions in each law to various aspects of normal agricultural operations.

Broiler and turkey production at the farm level in the United States consists of, almost exclusively, family-owned and family-operated relatively small farms. We conducted, in concert with NCC and NTF, a survey of poultry growers in 2001, which focused on farm size and litter management techniques. Litter, at a poultry farm, is the combination of bedding material—such as rice hulls or pine shavings—and bird manure. Over 16,000 growers (or almost half of all U.S. poultry growers) participated in the survey, giving us a very robust data set from which to view our industry's nutrient management techniques. The survey indicated that average poultry farm size was as follows:

Table I

Typical Poultry Farm Size

	Average	# of poultry houses	# of birds
Broiler	157	3.21	63,799

Table I—Continued

Typical Poultry Farm Size

	Average	# of poultry houses	# of birds
Turkey	226	3.05	27,004

Given the relatively smaller acreage of poultry farms makes it clear that the cash income these families derive from growing poultry is vital to the survival of these farms. Indeed, poultry producers have thrived in rural areas of the country that were not competitive in traditional row crop farming, and have brought a steady, reliable source of farm income dollars to these areas. When combined with the investment of processors in feed mills, hatcheries, and processing plants—typically with more than 1,000 jobs per plant—poultry production has been an economic anchor to many rural areas from Pennsylvania to Texas, from Minnesota to Florida and along the West Coast.

Commercial broilers and turkeys are raised in well-lit, well-ventilated comfortable "houses"—typically 40 feet long x 400 to 500 feet long, with an eave height of about 13 feet. They have free movement to readily available water and feed in the house, and temperature is carefully controlled for bird comfort. The floor of the houses are covered with 8 inches or so of an absorbent bedding material such as pine shavings or rice hulls which also provide a comfortable, and sanitary, environment for the bird. Bird manure is absorbed into the litter. Periodically, the litter is removed from the house and most commonly used as a natural organic fertilizer. We need to be clear broiler and turkey litter is not a waste by definition, because it is a commodity that is bought and sold or traded every day in this country. Since it is dry, it can efficiently be transported considerable distances—truckloads of north Georgia litter, for example, are sold to south Georgia row crop farms as an organic fertilizer.

As a fertilizer, litter will provide nutrients to crops and pasture to enhance productivity. But it offers some very unique advantages in providing these nutrients. First, the natural forms of nitrogen and phosphorus in litter have been shown to be less likely to "runoff" in storm water than the inorganic nutrients available in commercial fertilizer. Litter also provides soils organic matter to improve soil tilth and structure, thereby reducing erosion and compaction and enhancing a soil's resistance to drought. The salt build-up noted with long term used of commercial fertilizer is not only avoided but is actually counter-acted by the use of litter, restoring soils to their former productivity. Poultry litter contains many micronutrients so essential to maximizing crop production; its use also reduces how much natural gas this country must consume to produce commercial fertilizer. Like any nutrient source, it must be managed properly. However, applied at agronomic rates it is clearly environmentally superior to the use of commercial fertilizer.

Poultry growers are using litter in an agronomically and environmentally sound manner. In our 2001 survey, we also learned how much litter growers were utilizing on their own crops and pastures, versus how much they sold, traded or otherwise used. Growers also supplied information on the crops or forage they produced on their farms. From this data, we calculated an overall nutrient application rate for poultry growers, as well as the average nutrient uptake rate for the crops raised. Those results are provided in Figure I.

This data indicates that as early as 2001, the industry had shifted from a nitrogen based application rate to phosphorus based rate. This is significant because, historically, litter had been applied to fields closer to its nitrogen uptake rate, which led to a slow build-up of relatively insoluble phosphorus in the soils. Indeed, a grower going into an NRCS office in the late 1990's for a nutrient management plan would have received a nitrogen based plan. The slow build-up of phosphorus that resulted from such a plan was viewed as environmentally benign given the unlikelihood it would run off; farmers were simply "banking" phosphorus on their soils against the day they no longer raised poultry and would have to purchase commercial fertilizer. Since phosphorus is commonly the most expensive nutrient in fertilizer, the farmer was avoiding that future expense. However, in the last decade, and in particular in areas where there is a substantial conversion of farm land to other uses—concerns were raised regarding the levels of phosphorus accumulating in soils. The ag departments of many universities, and USDA Extension Service and other USDA offices, and the growers and the processors worked together to develop and implement nutrient management plans to address the conversion to phosphorus based plans—and indeed, the results from the 2001 survey confirmed those actions have been successful.

For the poultry grower, there are four tiers of regulation and/or oversight they are subject to ensure agronomic use of litter. The first tier, of course, is the federal tier under the CAFO NPDES permits. Any poultry grower with a discharge is required to have an NPDES permit, including the preparation and implementation of a nutrient management plan. The second tier is state regulation to ensure agronomic application rates. Many states have instituted permits or nutrient management requirements for poultry producers. Examples include (but not necessarily limited to) Alabama, Delaware, Indiana, Kentucky, Maryland, Minnesota, Missouri, Ohio, Pennsylvania, Texas and Virginia. Generally speaking, these programs emphasize development and implementation of nutrient management programs, and focus more heavily on larger growers—125,000 birds or more for broilers, 65,000 birds or more for turkeys.

The third tier is the processor—or integrator. Today's production contracts include language requiring the grower utilize litter in an agronomically sound manner, and to obtain and follow a nutrient management plan prepared with the help of experts such as NRCS, or extension service or similarly qualified personnel.

Note, the integrator stipulation applies to all growers—even those who would be too small to be subject to a federal or state permit. This holistic approach to nutrient management planning is intended to ensure the continued use of an excellent organic fertilizer indefinitely; and produce environmental benefits vis-à-vis the use of commercial fertilizer. Today, close to 100% of all broiler and turkey growers—not just defined CAFO's—have nutrient management plans in place.

In watersheds with a water quality impairment, a fourth level of regulation is available to EPA and the states under the Clean Water Act to ensure reduction of loads in the watershed so water quality goals can be achieved. Through the Total Maximum Daily Load—or TMDL—program, all inputs are evaluated, and the necessary steps to allow achievement of water quality goals are apportioned amongst all contributors to pollutant loads—point source and non-point source alike.

There are some areas of the country where there are nutrient-water quality issues, and where poultry farms are located. Poultry producers—the small family farms whose families have often lived in the regions for generations—recognize the value of improved water quality. They have been willing to adopt additional best management practices in order to further reduce any environmental impact from the operations. Poultry farmers are no different from other farmers in that they realize their livelihood is based upon the land and water, and want to preserve the value of their communities in general, and their farms in particular, for future generations.

In some situations recently, however, CERCLA/EPCRA have been utilized to allege the release of phosphate in animal manure results in the release of elemental phosphorus regulated by these statutes. This causes almost exclusive emphasis on reduction of poultry-related nutrients, to the exclusion of other sources of these nutrients. This is an egregious error, and in the end, the water quality issue may be made worse by only addressing poultry nutrients, rather than the whole universe of potential contributors to nutrients in streams as was intended under the TMDL program under the Clean Water Act. In Figure 2, I have provided comparison of nutrients available in poultry litter in Georgia and Virginia compared to the nutrients available in commercial fertilizer.

The results for these states are pretty typical of what you would see for any poultry state: there is 7-10 times more nitrogen and 4-6 times more phosphorus available from commercial fertilizer sold in the state than in all the poultry litter generated. And, remember, poultry litter is already subject to up to four tiers of regulation or oversight, including the TMDL program. For example, a nutrient management plan at a poultry farm will require a buffer zone—usually 35 feet to 100 feet—around a drainage channel on an agricultural field. With commercial fertilizers, there is no such oversight or regulation, theoretically the fertilizer spreader truck could drive right through the drainage area to avoid the lost time of diverting around it.

Even where properly applied, nutrients in commercial fertilizers are generally more soluble than in litter, i.e., more prone to runoff. Yet, when litter is solely targeted as the source of nutrients, and subject to an even higher level of regulatory scrutiny, many may choose to forego the "hassle" factor and switch to commercial fertilizers. Often these are non-poultry farmers who have previously bought litter for their nutrient needs. Not only does this reduce poultry farmer income, and cause more consumption of natural gas for commercial fertilizer production, it also causes nutrients that are, pound for pound, more likely to runoff in a storm event to be placed in the watershed, exacerbating the nutrient problem, rather than solving it.

I am not trying to point a finger at agricultural commercial fertilizer users. Whether commercial fertilizer or poultry litter, supplying nutrients to crops is a cost for the farmer. A farmer must be efficient in order to compete and remain a viable operation, so I believe farmers as a whole judiciously use either source of nutrients. Further, with nitrogen in multiple forms all around us and phosphorus being the sixth most common element on earth—there is no lack of nutrient sources completely outside agriculture, from septic tanks to sewage plants, from fallen leaves to homeowners desperately trying to win "yard of the month." The point here is not to blame others, but rather expose the fallacy, and ultimately the failure, of attacking only one nutrient source—a comparatively minor one that is already subject to regulation and oversight—in addressing these watershed nutrient issues. Utilizing CERCLA/EPCRA to increase requirements despite the agricultural exemptions Congress wrote into these laws, on to the agronomic use of litter will stigmatize its usage, and increase the use of—and pollution from—commercial fertilizers. Congress provided the TMDL program under the Clean Water Act to holistically solve these type of watershed wide water quality issues. Where the CERCLA/EPCRA enforcement focuses solely on phosphorus from animal agriculture—a significantly smaller piece of nutrient loading—the TMDL easily accommodates, and allows EPA and the states to address all sources of nutrients, be it agricultural or urban, from a specific source or from multiple soil sources.

In recent years, also, there have been several enforcement actions alleging an animal agriculture facility was not in compliance with permitting aspects of the Clean Air Act, or release reporting requirements of CERCLA and EPCRA. Unequivocally, broiler and turkey farms are not violating Clean Air Act standards, or Clean Air Act permitting requirements. The fact is that the levels of VOC's, particulate matter and PM10, etc. in broiler and turkey exhaust air are significantly below the permitting thresholds in the Clean Air Act. Certainly, standards change and evolve over time, and it is conceivable that at some point, for some pollutant, a broiler or turkey farm will be subject to Clean Air Act requirements. We will vigorously participate in the process of proposed changes to these standards, basing our presentations on sound scientific principles. And, of course, we recognize the obligation to comply with the potential regulatory revisions. But today; we are fully in compliance, and any allegation that broiler or turkey houses are avoiding or not complying with Clean Air Act rules and regulations is simply false and without basis.

The natural breakdown of organic nitrogen deposited by poultry in litter in a broiler or turkey house can create ammonia. This has led to enforcement action under CERCLA and EPCRA against a few broiler farms alleging they have exceeded release of the 100 lb/day reportable quantity for ammonia, and should have notified the National Response Center and others concerning this release.

For a moment, consider the family farmer trying to determine whether or not the broiler or turkey farm has exceeded a CERCLA/EPCRA release threshold. Assume the farmer has assembled the appropriate sections of the Code of Federal Regulations, the National Academy of Science report questioning the accuracy and applicability of emissions estimates in previous studies, the court opinions from the Denver and Kentucky courts concerning the release of ammonia from animal housing, EPA CERCLA/EPCRA report guidance documents and recent studies listing emission rates for various other farms, who may or may not follow some of the same production practices.

The first thing the farmer will notice is that the published emission rates vary by almost two orders of magnitude. So the farmer must decide which to use—the highest, the lowest, the average, the one with the most similar production practices, or perhaps the most similar climate, or bird size? On the heels of that decision, the farmer must decide if the release standard is applicable "per house" or per farm. Twenty-five years of regulatory history and published EPA guidance says it should be quantified per house, yet two recent court cases might suggest to the farmer he should aggregate the release. The farmer then decides to call the environmental manager at the processor's poultry plant and ask whether the release should be calculated per house or per farm. The environmental manager does not know either, but the processor had requested—almost two years ago—clarification from EPA on this exact subject, and had not yet received a response.

The farmer returns to trying to determine an emission rate. The studies available on broilers and turkeys show that the release of ammonia increased as the birds got bigger. But, on a day to day basis, many other factors came into play—the type of bedding material, the number of flocks previously raised on the litter, the temperature in the house, the moisture level in the house, the use of litter treatments, and many other variables rarely described—let alone quantified in these research reports.

There are other questions the farmer could ask like: "Won't some of the ammonia be converted to an aerosol ammonia hydroxide prior to release, given house conditions are ideal for this to occur." And if so, what percent will be converted, for this is an important issue as the RQ for ammonia hydroxide is 1000 lb/day—10 times greater than the anhydrous ammonia RQ. Yet, not a single study before the farmer addresses this fundamental question.

Ultimately, the studies conducted under the Air Consent Agreement—which the broiler industry is participating in—may provide the farmer with some of the answers necessary to determine if the farm is subject to release reporting requirements.

But at some point, the farmer has to wonder: "Why am I having to do this?" CERCLA and EPCRA are intended to advise emergency response personnel and the public about threats to human health and the environment. The entire farm family goes into each and every one of their broiler or turkey houses everyday, and have for years, and they are as healthy as can be. The farmer knows it is vital to keep the house properly ventilated, and has invested substantial amount of capital in ensuring this. The farmer knows that ammonia levels in the house should average 10 ppm or less. While certainly there may be short term increases in ammonia concentration above 10 ppm depending on the computer controlled ventilation system program, the farmer knows the houses should not reach the NIOSH 8-hour ammonia occupational standard for ammonia of 50 ppm. Poultry is more sensitive to ammonia than humans, and reaching that type of ammonia plateau would affect the growth performance of the bird. And a decrease in performance leads to a decrease in pay, so the farmer is very motivated to manage ammonia levels.

The ventilation system moves large quantities of air through the houses—at 5 mph when the birds are biggest and temperature warmest (and hence, release of ammonia is greatest). This leads to a rapid dilution of ammonia in the exhaust, and the wind speed also enhances dispersion outside the house. In fact, the release of 50 lb/day from a house—or about what the highest level most studies suggest would come from one house—would result in a concentration of only 0.5 ppm ammonia 100 feet from the exhaust fan according to the EPA SCREEN3 model. This is far below any suggested health standard or occupation standard for exposure to ammonia.

And so again, the farmer asks "Why must I do this, with all the uncertainty about how to properly account for and measure ammonia release?" Because even if the farmer does so, and calculates on a given day that reporting is required, there will be no emergency response, and there will be no impact on human health, starting first with the farmer's family.

We ask you to support the legislation introduced by Congressman Ralph Hall to re-affirm it was not the intent of Congress to require the farmer to report release information that does not impact emergency response or human health.

Mr. GILLMOR. Thank you very much. Dr. Leon Weaver.

STATEMENT OF LEON D. WEAVER

Mr. WEAVER. Thank you, Mr. Chairman. My name is Leon Weaver. I am a dairy farmer and a veterinarian. And I have been involved in dairy veterinary medicine and dairy management consulting and dairy production for over 30 years. Before I became a full-time dairyman 7 years ago, I served on the faculty and was director of the University of California's Veterinary Medicine Teaching and Research Center at the University of California, Davis.

Today, my testimony is given on behalf of my dairy farm, Bridgewater Dairy, the dairy cooperative that we are a member of, Continental Dairy Products, and a sister cooperative, Select Milk Producers. I am also on the board of directors of the Ohio Dairy Producers, and while this hearing was not a subject of our discussion, I am familiar with the views and attitudes of many Ohio dairy producers and unaware of any who have views at variance of what I am going to express today.

Bridgewater Dairy milks 4,000 cows, and our farming company, Bridgewater Farming, raises crops on over 2,800 acres of land. In that respect, we are a large farming operation, but I want to share with you that we are a family farm. Our farm and our dairy is owned by my wife and my son and myself, and a partner and his wife who are also dairymen, and we alone are the management team, hands-on, day-to-day, it is our money at risk.

Dairy farming is a very capital-intensive business. Cows today can cost over $2,000 each. Land can cost $2,000-5,000 an acre. So it is easy to see that even a small farm, much smaller than mine, can soon have millions of dollars in capital at risk. That is what I want to share with you about my concern for these requirements that we are discussing today.

The uncertainty that is introduced into my environment has awesome consequences for a family farm like ours. We are all interested in the science, and we are all interested in the environment, and, fortunate for us as dairy producers, we recognize that good stewardship and good care of our animals and our land and environment, are essential to running a profitable enterprise. We simply can't have healthy cows and high productivity and profits if we are not taking care of the environment. We survive because the health of our animals and the quality of the feed and water that we produce are essential to the productivity of our cows.

To that end, many of us go far beyond what is required by the Law. Members of our coop and other dairymen that we know are installing things like methane digesters for alternative energy production and the treatment of manure. We establish buffer zones to protect repairian areas and waterways. For example, a manure digester for my dairy would cost over $5 million. Several of our coop members have installed those, and we are making plans—not finalized—to install one ourselves. Not required by Law, but to be responsible to the environment and the cattle that we raise.

I want to mention as an aside when I described our farm being a family farm, that Continental Dairy Products membership is about 25 dairymen, are all of a similar size of us, and every single one of them is a family farm just like I described our Bridgewater Dairy. And Select Dairy Producers, which is much larger in Southwestern United States, they are all family farms, they are husbands and wives and children. And I am going to come back to that later.

As has been stated, the issue is whether we should be subject and our manure should be subject to EPCRA and CERCLA regulation. I think we have to be careful and watch out for some unintended consequences. The first thing that has been stated is that there are no civil suits available. Well, indeed there are civil suits available under the Failure to Report Act, and that can cost as much as $27,000 per day. $27,000 per day is $750,000 a month. What lender would want to loan me money with that potential liability?

The second intended consequence—several people have mentioned how much manure large livestock, and how much phosphorous a large livestock operation might produce. Another way to say what has already been said is that the manure from one cow produces the amount of phosphorous necessary to grow corn on one acre of land per year. At Bridgewater Dairy, we distribute our manure over more acres than we have cows, just like the 20 or 30 or 50 or 100 cow dairy that you might have I your mind's eye. We are required by the regulatory authorities that we function under to show that we plan for the nutrient requirements for our crop, that we document the soil content—the mineral contents of the soil, and that we not put more fertilizer, organic or inorganic, on our fields than that crop requires. And those records are reviewed not less than twice a year by my regulatory authority. What neighbor of mine would appreciate using manure, a renewable resource, for fertilizer if he or she might come under the EPCRA/CERCLA reporting requirements? An unintended consequence—one unintended consequence is to make less land-space available to concentrate the application of manure in smaller areas.

When I grew up on a farm in Pennsylvania and was active in 4-H and FFA, I was told that if I got a good education and I worked hard and I adopted the best management practice and technology available, that agriculture could be a sustainable enterprise for me and the next generation. I have done those things, and I have been successful in enabling my generation to farm when we are one child out of six. And I believe that if the requirements that are being proposed were to be enacted today, that for my son, and certainly my grandson, to continue in animal production would probably require him to move to another continent for no other reason than the risk the lenders will not be willing to take. Thank you.

[The prepared statement of Leon D. Weaver follows:]

Testimony of Leon D. Weaver, V.M.D.
Before the House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials

November 16, 2005

Good afternoon, my name is Leon Weaver. I am a dairy farmer by trade and a veterinarian by training. I have been involved with dairy farming either as a veterinarian, dairy management consultant, or dairy farmer since 1972. Before becoming a full-time dairyman, I served as the Director of the Veterinary Medicine Teaching and Research Center at the University of California at Davis.

My testimony today is given on behalf of my dairy farm, Bridgewater Dairy, LLC, my dairy cooperative, Continental Dairy Products, Inc., and our sister cooperative, Select Milk Producers, Inc. Bridgewater Dairy milks nearly 4000 cows and Bridgewater Farming, raises crops on 2800 acres of ground. In that respect, we are by any measure a large farming operation, and the size of Bridgewater Dairy is typical of the dairies that are members of Continental Dairy Products and Select Milk Producers.

Even though my farm is large, I still consider it a family business. My son, my partner, our wives, and I own the dairy. My wife, son, partner, and I are involved in the day-to-day operations of our farm. Bridgewater Dairy represents a huge investment of time, money, and capital by my family and my partner's family. It is the same for the dairy farmers in my cooperative and dairy farmers across the country. Dairy farming is capital intensive. Cows, for example, now sell for over $2,000 each. The price of land ranges dramatically from region to region, but frequently often sells for two, three, or five thousand dollars per acre. It is easy to see how even a relatively small dairy farm might involve an investment of millions of dollars.

That is why I am here today, to help explain how the uncertainty of EPCRA and

CERCLA regulation adversely affects agriculture by risking the investment and hard-earned capital of family farm operations. Before I explain the details of exactly how farmers are placed at risk, it is important that the Committee realize that responsible farmers are not menaces to the environment. I have met with literally thousands of farmers, mostly dairy farmers, over the last thirty-three years, and not one that I have met wishes to harm the environment. It is in the best interest of dairymen and women to protect the environment. Dairy farmers survive because of the health of their animals and the quality of the feed and water that their cows consume. We all realize that healthy, well-treated cows produce high-quality milk.

In addition, farmers often go above and beyond what is required by law to protect the environment. For example, many of the dairies in my cooperative have installed manure digesters to turn waste into electricity. Other farms have provided for additional buffer zones between the fields where manure might be spread and sensitive watercourses. These are only two examples of voluntary actions of responsible farmers, above and beyond those required by state or federal law. These actions, in the short-term, increase the cost of farming. A manure digester is a multi-million dollar investment. Similarly, ground taken out of crop production to serve as a buffer provides no monetary return or cattle feed. Nevertheless, these actions are beneficial for us, our neighbors, and the environment as a whole.

Lastly, farmers are already subject to environmental regulation related to manure management. Bridgewater Dairy is required to record and monitor the levels of phosphorous in the ground on which we spread manure. This nutrient balancing and phosphorous monitoring is documented, and the records are maintained. These records, which occupy an entire banker's box, demonstrate that in the eight years of our operation, soil phosphorus levels are being maintained at the safe and agronomic levels recommended by agronomists and all relevant regulatory agencies.

Returning to the current CERCLA/EPCRA situation, the clear problem is that no one in this room can provide a clear answer to the question, "To what extent are agricultural operations subject to the various requirements of CERCLA and EPCRA"? Others on this panel have explained why the legislative history demonstrates that Congress had no intent to include naturally occurring manure as a covered substance, but if the answer were crystal clear, there would be no need for this clarifying legislation. Obviously, the current provisions are not so clear as to definitively exclude manure from EPCRA and CERCLA. I am aware of no judicial body that has answered this question. As a result, farms are being placed at risk.

The costs of remediation required either by a lawsuit for natural resource damages or any other governmental enforcement action could quickly reach levels that would destroy the value of an entire family farm operation. Additionally, EPCRA provides authority for citizen actions for enforcement, and the risk of a farmer facing a citizen lawsuit demanding draconian penalties is real. Of course, there would always be the possibility of settlement at a lesser amount that what was demanded. But to me, that is simply a shake down. Where the law is unclear, and the results so illogical, such risks are unacceptable.

Imagine the scenario where the responsible farmer faces a multi-million dollar penalty for spreading manure on his fields–not because the manure has contaminated a stream in violation of the Clean Water Act, but simply because the farmer's cows produced manure. Of course, the petroleum-based fertilizers that the farmer could have used instead of naturally occurring manure are exempt from CERCLA and EPCRA. Somehow, if these chemicals pass through an animal and are then re-deposited on the land as the "toxic substance" called manure, they become subject to regulation? I respectfully argue that Congress did not intend that the naturally occurring nutrients in animal manure be regulated as inherently toxic substances.

Due to the uncertainty of EPCRA and CERCLA application, and as part of our push for environmental responsibility, my farm, and the farms of several other Continental and Select members, entered into the EPA Consent Decree and Monitoring Study to measure volatile organic compounds and particulate matter produced by agricultural operations. In fact, some of the highest rates of participation in this program by dairies are in the areas where Continental and Select member farms are located. We hope that this study establishes scientifically based data that can be used by farmers to understand the impacts that their operations have on the environment and, if appropriate, work to improve their operations.

This legislation will not render the Monitoring Study a nullity. In addition to EPCRA and CERCLA, the Consent Decree and Monitoring Program involves important studies and waivers of liability under the Clean Air Act. I, for one, regardless of Congressional action on EPCRA and CERCLA, plan to continue my participation in the monitoring program so that this important study can be completed. Accordingly, the current EPA program will serve an important purpose even if Congress confirms that the manure produced by farming operations is not subject to CERCLA and EPCRA.

Thank you for the opportunity to appear here this afternoon. Once again, I urge that you act to protect America's responsible farming operations from the potential of financial ruin by clarifying the coverage of CERCLA and EPCRA.

Mr. GILLMOR. Thank you, Dr. Weaver. Dr. Robert Lawrence.

STATEMENT OF ROBERT S. LAWRENCE

Mr. LAWRENCE. Thank you, Mr. Chairman and members of the committee. It is a privilege to be here today. I come from a public health background after doing 25 years of clinical work as a general internist, and the public health perspective is one of harm reduction. In the School of Public Health, we often talk about the fact that our genes cock the gun and environment pulls the trigger. What you are dealing with our issues related to how can we continue to protect the environment so that our genes do not unintendedly create disease because of consequences of concentration.

There has been a lot of discussion so far about the fact that there are a lot of natural products in manure. What is unnatural is the enormous the concentration that occurs with CAFOs. There are four basic public health issues that you should be considering as you contemplate whether or not to alter the EPCRA rule.

First, current methods of industrial animal production harm the environment and threaten the health of the public. CAFOs introduce huge amounts of waste into the environment, as you have already heard. By one measure, about 1.4 billion tons of waste, equal to about five tons of animal waste per person. So Congressman Dingell's question earlier about a two million hog facility would be equivalent to about a 10 million—excuse me, a 2,000 hog facility would be about a 10,000 population town with no modern sewage treatment or modern sanitation facilities.

Second point, industrial animal production results in the release of high levels of gasses, odors, nutrients, pathogens and antibiotic-resistant bacteria into air, water, and soil. In swine CAFOs, there have been identified more than 160 compounds in three categories in airborne emissions. These include gasses and vapors, bioaerosols, and non-biologic aerosols. The gasses of primary concern are ammonia, hydrogen-sulfide, carbon monoxide, and methane. The presence of bacterial and protozoan pathogens in groundwater intended for drinking water can cause mild to severe bouts of gastroenteritis depending on the immune system and the age of the affected individual. Contracting antibiotic-resistant bacterial infections can pose additional treatment challenges. Manure that is spread in excess of the lands absorptive capacity leads to excess nitrogen and phosphorous in the soil, nitrification of surface waters, algae overgrowth including some such as Fisteria facida that produce compounds toxic to fish and to humans.

Third, our current waste management practices in CAFOs threaten the environment. We have about 287 million dry tons of waste produced each year, more than 270 million dry tons of which is applied to land without any prior treatment except for drying. In contrast, the population of almost 300 million people in the U.S. produces about 6.9 million dry tons of treated waste in municipal treatment facilities, and about 3.6 million dry tons of that is applied to land as sewage sludge. The results of this over-application of so much animal waste are that an estimated 48,000 of the 300,000 miles of impaired U.S. rivers and streams are directly attributable to animal feeding operations. There are high levels of estrogens that—in the effluent from some animal feeding operations. Arsenicals used in poultry production for growth promotion and for controlling intestinal parasites lead to2 million pounds, or 2,000 tons of arsenic being introduced into the environment each year from U.S. poultry operations alone. And we all know that arsenic is a proven carcinogen. 25 million pounds of antibiotics are used in U.S. food animal production in sub-therapeutic doses in an experiment to produce antibiotic resistance. The 3 million pounds of antibiotics used to treat human disease are increasingly under assault because of the crossover of these antibiotic-resistant genes. And about 1.3 million households in the U.S. now have water supplies with nitrate levels above the maximum contaminant level of 10 milligrams per liter.

And finally, fourth, the feed ingredients used in industrial animal production are undermining the antibiotics used in human medicine. Resistant strains of bacteria that develop in CAFO animals undermines the usefulness of these same antibiotics for treating human infection. The antibiotics are added to animal feed, so animal feed increasingly contains a number of things that are not natural organic materials, also includes scrapings from iron foundries, which has cadmium and lead and other heavy metals, all of which can get into the food chain and harm the human population. According to the Union of Concerned Scientists, more than 70 percent of all antibiotics produced in the U.S. now are used in animal production.

We have, with these enormous threats to the health of the public, this is not the time to relax expectations and standards for the regulatory attention that CAFOs need in order to protect the safety of the American people. In 2003, the American Public Health Association, representing 80,000 public health professionals, felt there was sufficient documented harmful effects of CAFOs to warrant passage of a resolution calling for a moratorium on the building of new CAFOs until additional data can be gathered and policies implemented to protect public health. The evidence continues to build since then that these are dangerous and harmful operations to the health of people living in and around the CAFOs.

Thank you, Mr. Chairman.

[The prepared statement of Robert S. Lawrence follows:]

PREPARED STATEMENT OF ROBERT S. LAWRENCE, EDYTH SCHOENRICH PROFESSOR OF PREVENTIVE MEDICINE, PROFESSOR OF HEALTH POLICY AND ENVIRONMENTAL HEALTH SCIENCES, DIRECTOR, CENTER FOR A LIVABLE FUTURE, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH

INTRODUCTION

Over the past 50 years, food animal production in the US has undergone a transformation. First developed in the poultry industry during the 1930s and 1940s, the industrial procedures of growing and processing large numbers of animals in heavy concentration has been adopted by the beef cattle, hog, dairy and some other industries. In today's industrial animal production (IAP) system, most animals grow to market weight in facilities know as concentrated animal feeding operations (CAFOs). The US EPA criteria for CAFO designation are species-specific and indicate the minimum numbers of animals per operation. CAFOs now dominate US livestock and poultry production. To illustrate this trend toward greater concentration of production, consider that in 1966, 57 million hogs were raised on one million US farms. In 2001 approximately the same number of hogs was raised on 80,000 farms (more than half were raised in just 5,000 facilities). The total production of hogs is now about 100 million per year. (USDA National Agriculture Statistics Service and US Census of Agriculture)

Today, animal production in the US is dominated by vertically integrated industries managing production from genetics of the breeding stock to finished products ready to be cooked for the table. High throughput is achieved through intensive operations under confined conditions that harm the environment and threaten public health in many ways. These factors led the American Public Health Association in 2003 to adopt a resolution calling for a moratorium on the building of new CAFOs until additional data can be gathered and policies implemented to protect public health. (APHA, 2004)

1. CURRENT METHODS OF INDUSTRIAL ANIMAL PRODUCTION (IAP) AND CAFOS HARM THE ENVIRONMENT AND THREATEN THE PUBLIC'S HEALTH.

Harm to the Environment

CAFOs generate and introduce huge amounts of waste to the environment. As of 1997, animal production in the US created approximately 1.4 billion tons of waste. This amount is the equivalent to about 5 tons of animal waste for each person in the country (Horrigan, 2002). Another way to look at this problem is to consider that since a hog produces about four times as much solid waste as an average person, a typical CAFO raising 10,000 hogs is equivalent to a small city of 40,000 people with no sewage treatment or modern sanitation facilities.

CAFOs generally produce more waste than can be utilized as fertilizer on nearby fields, and transportation costs prohibit shipping the waste to more distant croplands. These wastes are difficult to store because of the sheer volume produced and the expense associated with transporting. Storage cesspits for hog waste or poultry waste piles leak and pollute groundwater and streams. Waste from storage pits that is land applied can pollute the air, surface water, and shallow aquifers (Wing, 2002). The amount of phosphorus and nitrogen in the waste usually exceeds what crops can utilize or the soil can retain. Surface water can become contaminated and lead to algal blooms, eutrophication (Osterberg, 2004, APHA, 2004) and serious public health risks of pathogenic micro-organisms (Wing, 2000, Hamscher, 2003).

The experiences of large swine-producing states, such as North Carolina and Iowa, have shown that deep CAFO cesspits can leak and overflow into ground waters and nearby surface waters. A report produced by the Iowa State University Extension, in collaboration with the Iowa Department of Natural Resources, noted that from 1992-1998, 86 uncontrolled discharges into surface waters were reported, with 20 discharges associated with formed cesspits (Lorimor, 1999). These discharges, along with runoff from areas where manure is land applied, can contaminate both ground waters and surface waters with pathogenic microbes and nutrients that can cause human illnesses.

Threats to the Public's Health

In addition to the environmental impacts mentioned above, CAFO-generated wastes create many public health risks. (Wing, 2000, APHA 2004) A key issue is that animal feeds used in CAFOs may also include animal wastes, animal tissues and animal by-products, and other additives that can contaminate human food or the environment. Many feed ingredients used in CAFOs pass through the animal directly into manure, including heavy metals such as arsenic, antibiotics, nitrogen and phosphorus (Arai, 2003; Lasky, 2004; Silbergeld, 2004).

CAFO-generated wastes also contain pathogens that can cause disease in humans, including Salmonella, Campylobacter, and Cryptosporidium, and can pollute drinking water with nitrates in concentrations potentially fatal to infants. The presence of excessive nitrates in drinking water has been associated with blue-baby syndrome or methemoglobinemia, a cause of both illness and death in infants (Fan, 1996; Johnson, 1990). Some studies also suggest that the development of blue-baby syndrome is more likely when the nitrate-containing water supply is also contaminated with bacteria—a situation that may be expected when groundwater is contaminated with animal feces (Cole, 2000; Fan, 1996). In addition, animal studies and some human studies suggest that developmental defects in the central nervous system, as well as miscarriages, also may occur as a result of exposures to excessive levels of nitrates (Fan, 1996; Kramer, 1996).

Organic dust, bacterial endotoxins and manure-generated compounds such as ammonia and hydrogen sulfide are also found in CAFO-generated wastes (Schiffman, 2001). Many of the exposures to pollutants from CAFOs are intensified for employees and the people living in neighboring communities. Air polluted with ammonia, hydrogen sulfide, and dust from CAFOs is harming the health of both workers and residents living downwind from these operations.

Several published studies have documented a range of contaminants, microbial agents and health effects in workers exposed to swine (Wing, 2000; Hamscher, 2003; Chapin, 2005; Cole, 2000; Merchant, 2005). These studies provide the groundwork for an increasing body of research to evaluate possible community health effects. Similar to the way second-hand smoke affects not only the smoker but also impacts the health of those nearby, industrial animal production procedures can impact the health of not only workers, but also their families and community members.

Numerous studies describing the adverse respiratory effects occurring among swine CAFO workers and producers have been published in the U.S., Sweden, Canada, the Netherlands and Denmark (Donham, 1989; Holness, 1987; Zejda, 1993; Von Essen, 1998). Results of these investigations concur that approximately 50% of swine workers experience one or more of the following health outcomes: bronchitis, toxic organic dust syndrome (TODS), hyper-reactive airway disease, chronic mucous membrane irritation, occupational asthma, and hydrogen sulfide intoxication. These studies also have shown increased risks of exposure to bacterial and viral infectious agents among swine workers and producers compared to other agricultural cohorts (Thomas, 1994), as well as higher incidences of antibiotic-resistant bacterial infections (Saida, 1981; Nijsten, 1994).

Adverse health outcomes experienced among neighbors of large-scale animal production facilities have been reported in three published, peer-reviewed epidemiological studies. One study evaluated the effect of swine odors on mood in 44 people living near a swine facility (Schiffman, 1995). The results of the study indicated that people living near the swine facility had significantly more depression, tension, anger, fatigue and confusion than control subjects who did not live near a swine facility. In another study, the mental and physical health of 18 people living near a large-scale swine facility was evaluated (Thu, 1997). The results of this study suggested that people living near the facility had significantly elevated rates of physical symptoms that were consistent with symptoms reported in occupational studies of swine workers. A third study compared physical symptoms and quality of life among 155 individuals from 3 different rural communities (Wing, 2000). The community living within 2 miles of a large-scale swine facility reported significantly greater frequency of headaches, runny nose, sore throat, coughing, burning eyes, and diarrhea. Although no published studies have investigated the effects of large-scale poultry operations on the health of nearby neighbors, it is likely that similar health effects could be observed since swine and poultry facilities emit many of the same airborne contaminants.

People living near CAFOs experience serious impacts to water quality such as contaminated wells. (Flora, 2002; Stull, 2004). Community residents living near CAFOs and children of CAFO operators are also exposed to pollutants. A University of Iowa study found that people living near large-scale hog facilities reported higher incidence of head aches, respiratory problem, eye irritation, nausea, weakness, and chest tightness (Thu, 1997). Children of CAFO operators in Iowa have higher rates of asthma than do other farm children (Merchant, 2005). Several studies have also documented increased rates of physical and mental illness among people living near CAFOs (Wing, 2000).

Should Avian Flu take hold among the poultry CAFOs in the U.S. that currently produce about 8 billion chickens, turkeys, and ducks per year for human consumption, the workers involved in feeding, watering, catching, transporting, processing, and cleaning the barns for the next batch of 25-30 thousand birds would likely be at significant risk for bird-to-human movement of the H5N1 virus.

The need for greater public health scrutiny of IAP animal feed composition is well illustrated by the cases of bovine spongiform encephalopathy (BSE or mad cow disease). Animal feed that includes BSE-contaminated tissue (i.e., brain, spinal cord, etc.) is a prime way for the disease to spread. Chicken litter (feces, feathers, spilled feed) is still used in cattle feed, and the controls for monitoring the inclusion of “downer” cattle and slaughterhouse offal in poultry feed are inadequate to assure that prions (the abnormally folded proteins responsible for BSE) don’t enter the feed supply for poultry and, subsequently, the poultry litter used for cattle feed.

2. INDUSTRIAL ANIMAL PRODUCTION RESULTS IN THE RELEASE OF HIGH LEVELS OF GASES, ODORS, NUTRIENTS, PATHOGENS AND ANTIBIOTIC RESISTANT BACTERIA INTO THE AIR, WATER, AND SOIL.

Air

More than 160 compounds have been identified in airborne emissions from swine CAFOs (Spoelstra, 1980). These compounds can be grouped into 3 categories: gases and vapors; bioaerosols; and non-biologic aerosols (Cole, 2000; Donham, 1977; Olsen, 1996; Pickrell, 1991).

The gases associated with CAFOs of primary concern to public health are ammonia, hydrogen sulfide, carbon monoxide and methane. The main sources of these gases include poultry and swine facilities, windrows of stored poultry litter, cesspits adjacent to swine barns, and land-applied poultry litter and swine wastes. At high concentrations, ammonia and hydrogen sulfide adversely affect the respiratory system, and cause eye and skin irritation. The swine-related bioaerosols of concern to public health are endotoxins. Endotoxins are fragments of gram-negative bacteria that are generally present in high concentrations at a swine production facility. When endotoxins are inhaled, chronic respiratory symptoms such as coughing and wheezing, pulmonary impairment, and fever can result (Douwes, 1997).

Bioaerosols present in and around CAFOs include (but are not limited to) bacteria, antibiotic-resistant bacteria and endotoxins. Recent studies have shown that 98% of airborne bacteria present in large-scale swine and poultry operations are resistant to multiple antibiotics that are used in both animal production and human medicine (Chapin, 2005; McCarthy, in preparation).

Water

The presence of bacterial and protozoan pathogens in ground water intended for drinking water can cause mild to severe bouts of gastroenteritis, depending on the immune status and age of the affected individual. Contracting antibiotic-resistant bacterial infections can pose serious challenges in treatment. Studies published in the *New England Journal of Medicine* have shown an association between the use of antibiotics in animal production operations and antibiotic-resistant bacterial infections in humans (Molbak, 1999; Smith, 1999). Other studies of poultry, poultry farmers and poultry slaughterers have documented the spread of antibiotic-resistant *Enterococcus* sp. and *Escherichia coli* from poultry to humans (van den Bogaard, 2001; van den Bogaard, 2002).

In 1998, the Centers for Disease Control and Prevention, the U.S. government's lead agency for protecting the safety and health of Americans, conducted a pilot investigation of the microbial and chemical constituents of water and other environmental media affected by poultry litter around large poultry operations (Karpati, 1998). Results from this study indicated that ground water and/or surface waters near large-scale poultry operations were contaminated with the following:

- Nutrients, including nitrite, nitrate, ammonia and Kjeldahl nitrogen
- Solutes, including chloride, barium and copper
- Pesticides, including atrazine, methoxychlor, alachlor, metolachlor and cyanazine
- Antibiotic residues, including tetracyclines and fluoroquinolones
- Bacterial pathogens, including, *Escherichia coli, Salmonella* sp., and *Enterococcus* sp.
- Antibiotic-resistant *Escherichia coli, Salmonella* sp., and *Enterococcus* sp.

The CDC also investigated the microbial and chemical constituents of ground and surface water near a swine CAFO (Campagnolo, 1998). This study revealed that ground water and surface waters near the swine CAFO were contaminated with the following:

- Nutrients, including phosphate, nitrate and nitrite
- Common ions, including arsenic
- Trace elements
- Antibiotics
- Parasitic oocysts of *Cryptosporidium parvum*
- Bacteria, including *E. coli, Enterococcus*, and *Salmonella,* all demonstrated antibiotic-resistance to antibiotics that are commonly used as feed additives in swine production. Most of these antibiotics are also used in human medicine to treat clinical disease.

Soil

Manure land application in excess of the land's absorptive capacity also can lead to excess nitrogen and phosphorus in soil, eutrophication of surface waters and algae overgrowth—including some algae that produce compounds that are toxic to fish and humans.

3. CURRENT WASTE MANAGEMENT PRACTICES IN INDUSTRIAL ANIMAL PRODUCTION THREATEN THE ENVIRONMENT AND PUBLIC HEALTH.

Before industrial methods were adopted in animal agriculture, the amount of waste produced by small numbers of animals on family farms was applied to pasture and cropland in amounts that maintained the balance of soil fertility. Coupled with crop rotation and open pasturing of animals most farms were able to maintain an ecologic balance. With the emergence of CAFOs and the associated production in concentrated areas of huge quantities of untreated solid and liquid wastes, the ecologic balance was upset. Current animal production in the U.S. yields 287 million dry tons of waste, more than 270 million dry tons of which is applied to land without any prior treatment.

In contrast, the population of almost 300 million people in the U.S. produces about 6.9 million dry tons of treated waste in municipal treatment facilities, 3.6 million dry tons of which is applied to land as sewage sludge.

Impacts from waste: Rivers and streams

- An estimated 48,000 of the 300,000 impaired U.S. river and stream miles are due to animal feeding operations (USEPA, 2003)
- High levels of estrogens are in effluent from animal feeding operations

Drugs used in CAFOs end up in waste

- Arsenicals used in poultry production for growth promotion and for controlling intestinal parasites lead to 2 million pounds or 2,000 tons of arsenic being introduced into the environment each year from U.S. poultry operations alone.
- 25 million pounds of antibiotics are used in U.S. food animal production in subtherapeutic doses. About 75% of these antibiotics are excreted into CAFO wastes.

Impacts from waste: Drinking Water

- 1.3 million households have water supplies with nitrate levels above the maximum contaminant level of 10 mg/L. (USEPA, 2002)

In many states, it is legal for CAFO storage cesspits (or what are referred to as "lagoons") to leak millions of gallons of liquid waste, (Simpkins, 2002; Huffman, 1995; Schulte, 1998). Moreover, CAFO cesspits overflow or breech (Mallin, 2000; Wing, 2002). It is also important to note that these cesspits are often located on floodplains, extend below the water table or are sited over alluvial aquifers (valuable drinking water sources but vulnerable microbial contamination) (Simpkins, 2002).

4. FEED INGREDIENTS USED IN INDUSTRIAL ANIMAL PRODUCTION ARE UNDERMINING THE EFFECTIVENESS OF ANTIBIOTICS IN MEDICAL CARE.

Antibiotics are used extensively at sub-therapeutic levels in CAFOs. The antibiotics are added to animal feeds in addition to arsenic and other metal compounds for growth promotion purposes (Barza, 2002; Sommers, 2002; Momplaisir, 2001). According to the Union of Concerned Scientists, more than 70% of all antibiotics produced in the U.S. are used in animal production. It is estimated that 23 million pounds of antibiotics are used annually in U.S. animal production, as compared to 3 million pounds of antibiotics prescribed for humans. (Mellon, 2002). Most of these medicines are either identical to or very similar to human medicines. There is strong scientific evidence that the antibiotics used in CAFOs contributes to antibiotic resistance transmitted to bacterial pathogens that affect human disease. (Barza, 2002; WHO, 2001). Resistant strains of bacteria that develop in CAFO animals undermine the usefulness of antibiotics in treating humans (Mellon, 2001).

The World Health Organization recognizes that resistant strains of human pathogens have been identified in animal production facilities and has recommended putting an end to the non-therapeutic use of antibiotics in animal husbandry, (WHO, 1997). The American Public Health Association adopted Resolution 2004-13, "Helping Preserve Antibiotic Effectiveness by Stimulating Demand for Meats Produced Without Excessive Antibiotics" thereby recognizing the threat to public health posed by non-therapeutic use of antibiotics in CAFOs (APHA, 2004).

All uses of antibiotics inevitably lead to the selection of resistance organisms. In human medicine this problem is approached by selective use of antibiotics for confirmed bacterial infections, encouraging patients to complete the full course of treatment to eradicate the infection, and to educate patients and doctors alike that overprescribing of antibiotics for such things as viral upper respiratory infections contributes to the emergence of antibiotic-resistant organisms. Antibiotic resistant bacteria, especially in hospital-acquired infections, are an increasingly serious clinical problem. The same classes of drugs are used in food animal production as in clinical medicine.

How is antibiotic use in industrial animal production related to human health?

- Animals are given antibiotics in their feed throughout their life
- Antibiotic resistant bacteria are selected out in the gut of the animal

Antibiotic resistant bacteria in animal waste ends up on the meat and in the environment. Human exposure to antibiotic resistant bacteria then occurs from ingesting contaminated foods, breathing air containing bacteria, and drinking contaminated water.

CDC recognizes that virtually all important bacterial pathogens in the U.S. are becoming resistant to currently available antibiotics. In 1998, the National Academy of Sciences estimated that antibiotic resistant bacteria costs the US $4—5 billion each year in hospitalizations for protracted infections, loss of work, and premature death or disability.

Total Burden of Foodborne Illnesses (CDC, Emerging Infectious Diseases, 1999)

- Illnesses: 76,000,000
- Hospitalizations: 323,000
- Deaths: 5,200

A global problem needs global leadership: bacteria without borders

- Drug resistant salmonella, originating in Japanese fish farms, reached US in 3 years
- Bacteria move by wind from Africa to the US
- Wild birds carry bacterial and viral diseases across oceans
- Antibiotic resistance genes are picked up and transferred among bacterial populations, from non-pathogenic to pathogenic strains

The rate of spread of these antibiotic resistant genes and organisms is a function of how many hosts (people or food animals) are exposed to sub-therapeutic doses of antibiotics.

Summary

The public health threat of CAFOs reflects the multiple exposure routes through air, water, and soil of harmful gases, pollutants such as sulfur dioxide and nitrates, and pathogenic micro-organisms.

Gases, odors and nutrients are problematic but are not the only public health concern.

Antibiotic resistant bacteria are a major public health threat.

These real and urgent public health issues associated with CAFOs warrant strengthening rather than lowering the standards regarding air and water quality.

To date, no swine producing state has been able to control adequately manure waste and airborne emissions from swine CAFOs, such that potential environmental health problems and public health problems among neighboring landowners are eliminated.

Given the current situation and the efforts by large producers to introduce CAFOs to new areas of the U.S., now is not the time to be reducing the regulatory attention that CAFOs receive.

The documented harmful health effects of CAFOs motivated the American Public Health Association in 2003 to adopt a resolution calling for a moratorium on the building of new CAFOs until additional data can be gathered and policies implemented to protect public health.

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Mr. GILLMOR. Thank you very much, Dr. Lawrence. You heard the bells again. That means we are going to have another series of votes. But I want to be sure we get the panel concluded, so let me go to Ms. Merkel.

STATEMENT OF MICHELE M. MERKEL

Ms. MERKEL. Okay. Thank you, Mr. Chairman and members of the subcommittee for the opportunity to testify today. My name is Michele Merkel, and I am senior counsel of the Environmental Integrity Project, which is a non-profit organization that advocates for the effective enforcement of environmental laws. I am testifying today on behalf of 19 other organizations and individuals who are concerned about recent Congressional interest in exempting all hazardous releases associated with manure from the notification and reporting requirements under CERCLA and EPCRA.

We ask you to continue to require reporting under these statutes from large agricultural operations that release hazardous substances at levels that may jeopardize public health. In addition, we ask you to maintain authority under CERCLA to require livestock operations to clean up their un-permitted releases of hazardous waste. Without these statutes, the government is left powerless to protect critical natural resources like public drinking water supplies, and the public is unwittingly exposed to potentially dangerous quantities of hazardous pollutants.

As we have heard today, the face of animal agriculture has changed dramatically in recent years. The traditional practices of the independent farmer have yielded to an industrial paradigm that rests on economies of scale. The new system more closely represents manufacturing than it does farming. Now we have thousands, or even millions, of animals confined in buildings, and these mega-facilities can produce thousands of tons of waste every year, and are capable of releasing significant, even dangerous quantities, of toxic gasses to nearby communities.

For example, Threemile Canyon Farms in Boardman, Oregon, recently reported that its 52,300-head dairy cow operation emits 15,500 pounds of ammonia per day. This is 5,675,000 pounds per year. That is 75,000 pounds more than the Nation's No. 1 manufacturing source of ammonia air pollution.

Unless properly regulated, corporate agriculture presents serious threats to human health. As Dr. Lawrence just mentioned, the risks to public health is so great that the American Public Health Association, the Michigan State Medical Society, the Canadian Medical Association, as well as local boards of health, have all called for a moratorium on new construction of concentrated animal feeding operations.

CERCLA and EPCRA provide an essential safety net for protecting water supplies and protecting the air that we breathe. The reporting requirements under these statutes provide local, State and Federal agencies with critical information about potentially dangerous releases of hazardous substances that could affect communities. And if a reported release demands a response, the government may act to respond to that release. And if the government acts, it may recoup the cost of its action. CERCLA upholds the principle that polluters, not the public, should bare the cost and responsibility for remedying the harmful conditions that they create.

Now, we have heard industry representatives today assert that livestock operations should be exempt for a number of reasons. First, we often hear that the environmental community wants to use these laws to shut down agriculture, and that citizen suit litigation threatens to impose high penalties in natural resources danger. But this could—nothing could be further from the truth. There have only been a couple of citizen suits ever brought against CAFOs that have had CERCLA and EPCRA claims. These suits were brought by rural residents, including family farmers, against some of the largest operations in the country. In both Sierra Club cases, the industry did not pay a single penny in penalties. Furthermore, natural resource damages may only be recovered by a designated Federal, State or tribal trustee.

Another myth that we hear is that livestock operations are already over-regulated by Federal Law. First, CERCLA and EPCRA require the reporting of only non-federally permitted releases. If an operation's emissions are authorized by a permit under another Federal statute, they do not have to report these emissions. And releases that are federally permitted, are exempt not only from the notification requirements, but from CERCLA liability as well. However, health threats and pollution from factory farms has been poorly controlled by other Federal laws. States have never issued a single Clean Air Act permit to an operation to date, and although the Clean Water Act has required large livestock operations to obtain permits for more than 30 years, non-compliance has been widespread.

In 2001, EPA estimated that at least 13,000 operations were required to have Clean Water Act permits, but EPA and States had issued just 2,520 permits.

Industry also asserts that Congress never intended to apply CERCLA and EPCRA requirements to animal agriculture. However, they cite no authority for this claim. If Congress had intended such a result, it could have and would have excluded animal production facilities from the reporting requirements. Instead, they chose only to exempt the normal application of fertilizer, and provide an exemption for regulated substances used in routine agricultural operations. No one has tried to take these exemptions away. What industry has a problem with is that Federal courts have declined to apply these exemptions to corporate agriculture. But this is only happening in cases where the specific facts of the case have shown that the operation over-applied its waste to fields or vented dangerous quantities of hazardous pollutants from buildings.

Finally, industry argues that releases of hazardous substances from animal production facilities like ammonia and hydrogen-sulfide, should be exempt because these are naturally occurring. But there is nothing natural about amassing millions of animals in buildings and flushing their waste into pits that can be several football fields big, nor is there anything natural about over-applying the animal waste to crops that can't use the nutrients. This exemption is meant to apply only to releases of background levels of chemicals, or releases that occur naturally without any human interference, not to hazardous substances that are added to the environment and disposed of during the improper storage and handling of waste.

I am here today not because environmentalists or family farmers want to shut down agriculture. Rather, this is about holding all industries accountable for pollution that threatens public health and the environment, whether you are a manufacturing plant, a chemical plant, or an industrial agricultural operation. There is no compelling reason to exempt livestock facilities from these statutes, particularly when Congress has already put exemptions in place to cover those operations that farm responsibly. Like everyone else, rural residents have a right to know what toxins are being dumped into their air and water.

In closing, before you consider any amendments to current law, we request that you hold field hearings so that citizens who are affected by pollution from these large operations have an opportunity to testify as well. Thank you.

[The prepared statement of Michele M. Merkel follows:]

PREPARED STATEMENT OF MICHELE M. MERKEL, SENIOR COUNSEL, ENVIRONMENTAL INTEGRITY PROJECT

Thank you Mr. Chairman and Members of the Subcommittee for the opportunity to testify today. My name is Michele Merkel, and I am senior counsel of the Environmental Integrity Project (EIP), a nonprofit organization that advocates for effective enforcement of environmental laws. I am testifying this morning on behalf of

EIP, Center on Race, Poverty & the Environment, Clean Water Action Alliance of Minnesota, Conservation Council of North Carolina, Family Farms for the Future, Idaho Conservation League, Illinois Stewardship Alliance, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Iowa Environmental Council, Izaak Walton League of America, Land Stewardship Project, Natural Resources Defense Council, Northwest Environmental Defense Center, Savannah Riverkeeper, Inc., Sierra Club, Southern Environmental Law Center, Sustainable Agriculture Coalition, Waterkeeper Alliance, Melody Torrey on behalf of Missouri Stream Team #714, Rolf Christen, and Robert E. Rutkowski.

We are concerned about recent Congressional interest in exempting all hazardous releases associated with manure, including ammonia and hydrogen sulfide, from the notification and reporting requirements under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Reporting and Community Right to Know Act (EPCRA). We urge you to continue to require hazardous release reporting under these statutes from large agricultural operations that release ammonia or other hazardous substances at levels that may jeopardize public health. In addition, we urge you to maintain authority under CERCLA to require livestock operations to clean up their unpermitted releases of hazardous waste to the environment. Without these statutes, the government is powerless to protect critical natural resources like public drinking water supplies, and the public is unwittingly exposed to potentially dangerous quantities of hazardous pollutants.

STRUCTURE OF THE LIVESTOCK INDUSTRY

The Animal Feeding Operation (AFO) industry is a multi-billion dollar business. Most AFOs do not resemble the livestock farms of years past. Instead, many AFOs are industrialized operations that confine thousands of animals at a single location, often generating the waste equivalent of a small city.[1] Unlike traditional livestock farms where the animals grazed on pastureland, AFOs confine thousands, or even millions, of the animals in closed buildings for most of their lives, where they are fed a regimented diet in a closely controlled indoor environment.[2]

In the swine industry, for example, large confinement operations dominate production.[3] Hog AFOs typically confine approximately 5,000 hogs at any given time in totally closed buildings.[4] Such large AFOs are highly specialized operations which do not resemble traditional farming. They are more akin to manufacturing processes, in which the operator closely regulates the animals' environment, food source, and water supply.[5]

Animal production is also becoming consolidated in the hands of a few giant agribusinesses. In the broiler industry, for example, production has shifted away from small family farms to industrial production facilities controlled by large agribusinesses. Between 1982 and 1992, roughly 20% of broiler operations across the country shut down, yet the number of chickens raised increased considerably. Industrial-sized operations have replaced the traditional small producers that went out of business.[6]

Over 90% of all chickens are raised under a contractual relationship with "integrated" production and processing companies. Under this arrangement, the agribusiness "integrator" contracts with a "grower" to produce chickens for slaughter by the integrator. The integrator owns the chickens throughout the production process and supplies the bulk of the necessary inputs including feed and medication. The integrator also monitors the production operation and provides growers with detailed instructions regarding the day-to-day activities at the site.[7]

Consolidation and agribusiness control is not limited to the broiler industry. The trend in hog production is also toward fewer, larger confinement operations. In the last decade alone, the number of hog operations nationwide plummeted 50% while domestic hog production increased considerably. As with the broiler industry, the smaller, family-run hog farms have given way to large industrial-scale AFOs, where many of the hogs are raised under contract with an integrator. The dairy industry is becoming consolidated as well. Since 1998, over 40% of all dairies have vanished, but the number of larger operations has increased.[8]

The AFO industry is big business. The poultry industry alone generated over $21 billion in on-farm revenue in 1997, with much of the production coming from corporate producers operating large AFOs.[9] Similarly, the swine industry generates roughly $10 billion per year at the production level; revenue from consumer sales often exceeds $20 billion.[10] Large agribusinesses realize the lion's share of the profits. For instance, Tyson Foods, the world's largest meat producer, enjoyed $26.4 billion in sales and realized $1.9 billion in gross profits in 2004.[11] Smithfield Foods, the nation's largest hog producer, generated $9.3 billion in sales and $227 million in net income in the same year.[12] Revenues and profits continue to grow each year.

The face of animal agriculture has changed dramatically in recent years. The traditional practices of the independent farmer have yielded to an industrial paradigm that rests on economies of scale and externalization of pollution control costs. Large-scale "factory farms" are rapidly taking over the meat industry, and production practices that involve animals grazing on pasture are quickly disappearing. A new system of animal agriculture has taken hold, one that more closely resembles manufacturing than it does farming. Unless properly regulated, this new form of agriculture has the potential to do unthinkable damage to the environment.

ENVIRONMENTAL AND HUMAN HEALTH IMPACTS OF AFO POLLUTION

Animal feeding operations present enormous threats to the environment. These operations produce about 500 million tons of manure annually or three times more waste than humans generate each year in the United States.[13] The pollutants associated with AFO waste include: (1) nutrients such as nitrogen and phosphorous; (2) organic matter; (3) solids, including the manure itself and other elements mixed in with it such as spilled feed, bedding and litter materials, hair, feathers and corpses; (4) pathogens; (5) salts; (6) trace elements such as arsenic; (7) volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones.[14]

These pollutants often impair water quality in the nation's rivers and lakes when manure overflows from storage "lagoons" or when pollutants released to the air redeposit on waterways. For example, in 1995, approximately 25 million gallons of manure were discharged from a single hog AFO in North Carolina.[15] Similarly, discharges of thousands of gallons of animal waste have been reported in Iowa, Illinois, Minnesota, Missouri, Ohio and New York.[16] These discharges wreak havoc on the receiving waters, often killing hundreds of thousands of fish per event.

Perhaps the most common way that pollutants reach surface waters or leach into groundwater is through improper land application. AFOs frequently overapply animal waste to nearby fields, where it mixes with rainwater and runs off into rivers and lakes. The nutrient-rich runoff alters the chemical composition of receiving waters, and triggers a surge in algae and other aquatic vegetative growth. This vegetative growth can choke out fish and other marine life, and lead to increased treatment requirements for drinking water supplies. According to the EPA, "over-enrichment of waters by nutrients (nitrogen and phosphorous) is the biggest overall source of impairment of the nation's rivers and streams, lakes and reservoirs, and estuaries."[17]

This contamination poses serious risks to human health. Manure-related microbes in water can cause severe gastrointestinal disease, complications and even death.[18] In May 2000 in Walkerton, Ontario, an estimated 2,321 people became ill and seven died after drinking water from a municipal well contaminated with *E.coli* and *Camplyobacter* from runoff resulting from manure spread onto fields by a nearby livestock operation.[19] Manure can also carry arsenic and other toxic metal compounds, as well as antibiotics, into water contributing to antibiotic resistance.[20] Finally, pollution from animal confinements can cause nitrate contamination of drinking water supplies, which can result in significant human health problems including methemoglobinemia in infants ("blue baby syndrome"), spontaneous abortions and increased incidence of stomach and esophageal cancers.[21]

AFO air emissions also cause significant health problems in workers and in nearby residents. AFOs emit significant amounts of particulate matter (fecal matter, feed materials, skin cells, bioaerosols, etc.), ammonia, hydrogen sulfide, sulfur dioxide, volatile organic compounds, and other harmful contaminants into the air.[22] Adverse human health effects associated with air pollution from AFOs are manifold and may include respiratory diseases (asthma, hypersensitivity pneumonitis, industrial bronchitis), cardiovascular events (sudden death associated with particulate air pollution), and neuropsychiatric conditions (due to odor as well as delayed effects of toxic inhalations.).[23] Other problems include increased headaches, sore throats, excessive coughing, diarrhea, burning eyes, and reduced quality of life for nearby residents.[24] AFO air pollution is especially problematic, because neighboring communities are exposed on a near constant basis.[25]

Ammonia is a human toxin that EPA lists alongside arsenic, cyanide, and benzene as a hazardous substance under CERCLA. 40. C.F.R. § 302.4. The livestock sector produces roughly 73% of all ammonia emissions nationwide.[26] Some of the largest facilities produce staggering quantities of ammonia gas—comparable to pollution from the nation's largest manufacturing plants.[27] For example, Threemile Canyon Farms in Boardman, Oregon, reported that its 52,300 dairy cow operation emits 15,500 pounds of ammonia per day, more than 5,675,000 pounds per year.[28] That is 75,000 pounds more than the nation's number one manufacturing source of ammonia air pollution (CF Industries of Donaldson, Louisiana).[29] Buckeye Egg Farm's facility in Croton, Ohio reported ammonia emissions of over 4,300 pounds per day—43 times the reporting threshold under CERCLA and EPCRA.[30]

Human exposure to ammonia triggers respiratory problems, causes nasal and eye irritation, and in extreme circumstances, is fatal.[31] AFOs expose downwind neighbors are exposed to elevated ammonia levels, as well as other pollutants. For example, the Missouri Department of Health and Senior Services documented ambient ammonia levels downwind of a swine operation ranging from 153 to 875 ppb. The EPA submitted comments on the Missouri study, comparing the ambient ammonia levels to recommended exposure limits and noted that "the conclusion could be drawn that a *public health hazard* did exist at the time the . . . data was acquired." [32]

Ammonia also contributes to the development of fine particulate matter. Fine particulate matter causes significant health problems, including aggravated asthma, difficult or painful breathing, chronic bronchitis, decreased lung function, and premature death.[33] Fine particulate matter has been linked to increased hospital emissions and emergency room visits for people with heart and lung disease, and decreased work and school attendance.[34]

In addition to ammonia, EPA also lists hydrogen sulfide as a hazardous pollutant under CERCLA. High-level exposures of hydrogen sulfide, an asphyxiate, can cause loss of consciousness, coma and death. At least 19 AFO workers have died from sudden hydrogen sulfide exposure during liquid manure agitation. [35] Epidemiological studies of communities exposed to hydrogen sulfide reported symptoms such as asthma, chronic bronchitis, shortness of breath, eye irritation, nausea, headaches and loss of sleep.[36]

These risks to public health led the American Public Health Association to call for a moratorium on new concentrated animal feeding operations "until scientific data on the attendant risks to public health have been collected and uncertainties resolved." [37] The Michigan State Medical Society, the Canadian Medical Association, as well as local boards of health, have also called for moratoria on new concentrated animal feeding operation construction.[38]

EPCRA AND CERCLA REQUIREMENTS

CERCLA has two main policy objectives. First, Congress intended to give the federal government the necessary tools for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.[39] Second, Congress intended that the polluters bear the costs and responsibility for remedying the harmful conditions that they created.[40]

Specifically, section 103 of CERCLA provides that any person in charge of a facility from which a hazardous substance has been released in a reportable quantity (RQ) must immediately notify the National Response Center ("NRC").[41] For example, releases of ammonia and hydrogen sulfide that exceed 100 pounds per day must be reported under section 103.[42] Section 103(f)(2) of CERCLA further provides for relaxed reporting requirements for substances that are classified as a continuous release.[43] If a reported release demands a response, the government may act, pursuant to section 104, to respond to that release.[44] And if the government acts, it may recoup the costs of the recovery action under CERCLA section 107.[45]

In addition to the reporting requirements under CERCLA, owners and operators of facilities must also provide immediate notice of the release of an extremely hazardous substance under EPCRA. Section 304(a) requires an owner or operator of a facility to report the release of an extremely hazardous substance to designated state and local officials, if "such release requires notification of section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980." [46] The EPCRA emergency reporting requirements, therefore, track the CERCLA requirements and ensure that federal, state and local authorities are notified of potentially dangerous chemical releases.

The right-to know provisions of CERCLA and EPCRA not only empower government but also citizens. Information about chemical releases enables citizens to hold companies and local governments accountable in terms of how toxic chemicals are managed. Transparency also often spurs companies to focus on their chemical management practices since they are being measured and made public. In addition, the data serves as a rough indicator of environmental progress over time.

ANIMAL PRODUCTION OPERATIONS SHOULD NOT BE EXEMPTED FROM EPCRA/CERCLA

The AFO industry argues that Congress never intended to apply CERCLA and EPCRA requirements to animal agriculture. However, they cite to no authority for this claim. If Congress had intended such a result, it could have excluded animal production facilities, like hog or poultry facilities, from the reporting requirements of CERCLA.[47] Instead, Congress only chose to exempt "the normal application of fertilizer" from the CERCLA definition of release,[48] and provided an exemption under EPCRA for reporting releases when the regulated substance "is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate consumer."[49]

Both of these exemptions were considered by a federal district court in Kentucky which held that neither of the exemptions should apply to Tyson's poultry production operations. Tyson did not qualify for the routine agricultural use exemption, because it did not store ammonia in the chicken houses for agricultural use, nor did it use the ammonia in an agricultural operation.[50] Rather, it used exhaust fans and vents to release the ammonia to the environment so that it would not kill the chickens. Tyson did not qualify for the normal application of fertilizer exemption, because they were not applying ammonia to farm fields as fertilizer when they vented it into the atmosphere.[51]

A federal court in Texas also considered the normal application of fertilizer exemption. The court ruled that the exemption does not apply if Plaintiffs prove that the Defendants improperly stored and maintained large amounts of waste on their property, causing hazardous releases of phosphorous and other pollutants to nearby sources of drinking water.[52]

Industry representatives also argue that the CERCLA exclusion for "naturally occurring substances" should apply to livestock operations. Section 104(a)(3)(A) of CERCLA prohibits the President [through EPA] from ordering a remedial or response action "in response to a release or threat of release . . . of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found . . ." Industry argues that CERCLA should not apply to farming operations because "[s]ubstances, such as orthophosphate, ammonia and hydrogen sulfide, occur naturally in the environment in the same forms as they occur as byproducts of biological processes on farming operations." However, releases of hazardous substances from agribusinesses would not qualify for the exemption, because they occur as a result of activities associated with milk or meat production.[53] For example, as discussed below, in both of the response actions taken to date, the governments' actions were not based on releases of naturally occurring phosphorous or orthophosphate undisturbed by human activity. Rather, the governments sought to remove hazardous substances that were added to the environment and disposed of by the operations during the improper storage and handling of waste.

CERCLA/EPCRA FILL IMPORTANT GAPS IN PERMITTING STATUTES

CERCLA and EPCRA require the reporting of only non-federally permitted releases. Therefore, if a AFO's emissions are authorized by a permit under another federal statute, they do not have to report these emissions. Releases that are federally permitted are exempt not only from CERCLA and EPCRA notification requirements but from CERCLA liability as well.[54]

Although EPA and the States have permitted some AFOs under other federal statutes, CERCLA is still necessary to fill critical gaps. For example, under pressure from citizens and EPA, the California legislature overturned an exemption for agricultural operations and recently became the first state to require large animal operations to apply for Clean Air Act permits.[55] Although the Clean Water Act has required large livestock operations to obtain permits for more than 30 years, noncompliance has been widespread. In 2001, EPA estimated that at least 13,000 concentrated animal feeding operations were required to have Clean Water Act permits, but EPA and States had issued just 2,520 permits.[56]

Even if a facility were to have a federal permit, the permit would not necessarily address all of the releases of hazardous chemicals. A Clean Water Act permit, for example, would not address releases of hazardous chemicals to the air and, conversely, a Clean Air Act permit would not address releases of hazardous chemicals to water. Furthermore, not all statutes regulate the same chemicals. For example, the Clean Air Act does not regulate ammonia or hydrogen sulfide as hazardous air pollutants. Although CERCLA's list of hazardous substances were first identified under other statutes, including the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act, CERCLA authorizes the Administrator of EPA to add to this list "substances [like ammonia and hydrogen sulfide] which, when released to the environment may present a substantial danger to public health or welfare or the environment . . ."[57] Thus, EPCRA and CERCLA are necessary complements to federal permitting statutes to address hazardous pollutants that would not otherwise be regulated.

CERCLA/EPCRA CASES AGAINST AGRIBUSINESSES, NOT FAMILY FARMS

There have only been a handful of cases filed against AFOs for violations of CERCLA and EPCRA. In most of the cases, the defendants have been large corporate agribusinesses, not family farmers, and the releases of hazardous chemicals have been significant. Courts have consistently held that CERCLA and EPCRA reporting requirements apply to agricultural operations if releases of regulated hazardous substances meet regulatory thresholds.

Premium Standard Farms—In November 2001, the United States and Citizens Legal Environmental Action Network, Inc. settled a case against Premium Standard Farms, Inc. (PSF), the nation's second largest pork producer and Continental Grain Company. PSF's and Continental's operations in Missouri consist of more than 1,000 hog barns, 163 animal waste lagoons and 1.25 million hogs, primarily located on 21 large-scale farms in five counties. The settlement resolved numerous claims of violations under the CWA,[58] CAA,[59] CERCLA and EPCRA.[60]

PSF exposed downwind neighbors to elevated ammonia levels, as well as other pollutants.[61] Recent measurements taken pursuant to the settlement agreement reveal that PSF releases 3 million pounds of ammonia annually from the cluster of barns and lagoons at its Somerset facility.[62] These emissions make PSF the fifth largest industrial emitter of ammonia in the United States. This data does not include the ammonia gases released when liquid manure is sprayed on the company's nearby fields.

Seaboard Corporation—On January 7, 2003, the Sierra Club reached partial settlement of a lawsuit against the Seaboard Corporation, concerning pollution at one of the largest hog factories in North America. The settlement resolved all claims, except for Sierra Club's CERCLA and EPCRA claims.—CERCLA requires a person to report releases of a hazardous substance from a "facility." In an effort to avoid regulation, Seaboard argued that each pit and building should be counted separately. An appellate court found Seaboard's arguments ″unconvincing.″ The Court held that the entire 25,000-head hog operation was a single ″facility″ and that Seaboard must report the combined emissions from all its waste pits and confinement buildings.[63] Seaboard estimates that the total average daily emissions of ammonia are from its Dorman Sow Facility is 192 pounds per day, almost double the 100 pound per day reporting threshold under CERCLA.

Tyson Foods, Inc.—On January 26, 2005, the Sierra Club entered into a settlement agreement with Tyson Foods. Tyson is the number one poultry producer in the nation, and each of its four facilities that were involved in the case could confine approximately 600,000 chickens at one time. Under the decree, Tyson agreed to study and report on emissions from its chicken operations and mitigate ammonia emissions that have been plaguing rural residents for years. The settlement came in the wake of a court decision in 2003, when a federal judge ruled that the term "facility" should be interpreted broadly, including facilities operated together for a single purpose at one site, and that the whole farm site is the proper regulated entity for purposes of the CERCLA and EPCRA reporting requirements.[64]

City of Tulsa—The City of Tulsa filed suit against some of the largest poultry producers in the nation including Tyson, Simmons and Cargill.[65] The City alleged that the Defendants' growers polluted Lakes Eucha and Spavinaw, from which Tulsa draws its water supply, by applying excess litter to land application areas. As of September 1, 2002, just one of the Defendant's growers produced approximately 40,715,200 birds and an estimated 39,859 tons of litter in the affected watershed.[66] The City's complaint included claims for cost recovery and contribution under CERCLA. A federal court ruled that phosphorous contained in the poultry litter in the form of phosphate is a hazardous substance under CERCLA.[67]

City of Waco—In 2004, the City of Waco filed suit against fourteen commercial dairies for failure to properly manage and dispose of waste. The complaint alleges that hazardous pollution from these dairies contaminated Lake Waco, which is the sole source of drinking water for the City of Waco and a significant source of drinking water for surrounding communities.[68] The City's complaint includes claims for cost recovery and contribution costs under CERCLA. The Court denied the dairies' Motion to Dismiss and held, among other things, that the type of phosphorous that was released by the dairies was a hazardous substance under CERCLA.[69] The Court also held that the normal application of fertilizer exemption would not apply if Plaintiffs could prove that the releases of hazardous substances were caused by the dairies' improper handling of animal waste.[70]

State of Oklahoma—On June 18, 2005, the Oklahoma Attorney General's Office filed a lawsuit against some of the nation's largest producers of chickens, turkeys and eggs for water pollution in the Illinois River watershed caused by the improper dumping and storage of poultry waste.[71] The watershed contains elevated levels of a number of pollutants found in poultry waste. For example, the phosphorous from the poultry waste dumped into the Illinois River watershed is equivalent to the waste that would be generated by 10.7 million people, a population greater than the states of Arkansas, Kansas and Oklahoma combined.[72] The watershed also serves as the source of drinking water for 22 public water supplies in eastern Oklahoma.[73]

The Attorney General's complaint alleges violations of state and federal nuisance laws, trespass, as well as other violations of state environmental regulations. The State also seeks to recover the costs that it has had to incur, and will incur, to respond to the pollution. These costs include "the costs of monitoring, assessing and evaluating water quality, wildlife and biota in the [Illinois River Watershed]." [74] The State also seeks to recover Natural Resource Damages for the injury to, destruction of, and loss of natural resources.[75]

CITIZENS CANNOT RECOVER NATURAL RESOURCES DAMAGES OR PENALTIES UNDER THE RESPONSE SECTIONS OF CERCLA

Industry representatives have incorrectly asserted that citizen suits threaten to impose natural resource damage liability under CERCLA.[76] In fact, natural resource damages may only be recovered by a designated federal, state or tribal trustee.[77]

Industry has also raised alarms about high penalties from citizen suits and cases brought by municipal and state governments. Again, there is no rational basis for this assertion. Tyson and Seaboard did not pay a single penny in their cases brought by Sierra Club for failure to report their hazardous air emissions under CERCLA and EPCRA. Furthermore, penalties are unavailable under CERCLA for removal or remedial actions, regardless of whether they are initiated by government or by a private party.[78]

Finally, citizens are even limited in their cost recovery actions. A private party must prove as part of its prima facie case that the cleanup activities for which it incurred response costs were consistent with the National Contingency Plan.[79]

EXEMPTING AGRIBUSINESSES FROM EPCRA/CERLA REQUIREMENTS WOULD PREVENT EPA FROM GATHERING CRITICAL DATA

The National Academy of Sciences (NAS) issued a report in 2003 in which it expressed concern over AFO air pollution and criticized EPA and USDA for not devoting the necessary technical or financial resources to estimate air emissions and to develop mitigation technologies.[80] In response to NAS concerns, EPA negotiated an Air Compliance Agreement with industry that establishes an emissions monitoring program.[81] 2,700 participants have signed up for this agreement.[82] The stated purpose of the Agreement is to ensure that AFOs comply with applicable environmental requirements—including CERCLA and EPCRA requirements—and to gather scientific data that the Agency needs to make informed regulatory and policy determinations. Exempting AFOs from CERCLA/EPCRA liability will not only remove incentives for facilities to participate in the monitoring study, but will also prevent government and citizens from having access to critical information about potentially dangerous releases that could affect communities.

CONCLUSION

CERCLA and EPCRA provide an essential safety net for protecting water supplies and for protecting the air that we breathe. There is no compelling reason to exempt livestock facilities from these statutes when communities have been exposed to potentially dangerous quantities of hazardous pollutants from some large operations. Before you consider any amendments to current law, we urge you to hold field hearings so that citizens who are affected by pollution from livestock operations have an opportunity to testify.

End Notes

[1] EPA, Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, EPA—821-B-01-001 at 2-2 (2001) ("Environmental Assessment"), http://epa.gov/ost/guide/cafo/envir.html.

[2] EPA, Development Document for the Final Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, EPA—821-R-03-001 at 4-3 (2002) ("Development Document"), http://cfpub2.epa.gov/npdes/afo/cafodocs.cfm.

[3] Development Document at 4-3.

[4] Development Document at 4-3.

[5] Development Document at 4-13.

[6] *See* Development Document at 4-37.

[7] *See* Development Document at 4-36; see also 70 Fed. Reg. 4960.

[8] *See generally* Development Document.

[9] Development Document at 4-35.

[10] Development Document at 4-2.

[11] Tyson, Annual Report 2004, http://media.corporate-ir.net/media—files/irol/65/65476/reports/ar04.pdf.

[12] Smithfield, Annual Report 2004, http://www.rkconline.net/AR/SmithfieldAR2004/.

[13] USEPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7180 (2003) [hereinafter USEPA, *CAFO Final Rule*].

[14] Preamble to USEPA, *CAFO Final Rule* at 7181.

[15] Environmental Assessment at 2-17.

[16] *Id.* at 2-18; *see also* The New York Times, *How to Poison a River,* (Aug. 19, 2005) (commenting on a 3 million gallon spill from a 3,000 head dairy in New York)

[17] USEPA and USDA, *Clean Water Action Plan: Restoring and Protecting America's Waters* at 56 (Feb. 1998).

[18] David Wallinga, M.D., Institute for Agriculture and Trade Policy, *Concentrated Animal Feeding Operations: Health Risks from Water Pollution* (Aug, 2004).

[19] *Id.*

[20] *Id.; see e.g.,* Chapin et al., Airborne Multidrug-Resistant Bacteria Isolated from a Concentrated Swine Feeding Operation, 113 Environmental Health Perspectives 137 (2005).

[21] EPA, CAFO *Final Rule,* at 7238. *See also,* U.S. Environmental Protection Agency, Office of Children's Health Protection, *Drinking Water Contaminants—America's Children and the Environment: A First View of Available Measures,* http://yosemite.epa.gov/ochp/ochpweb.nsf/content/drinking-water-contam.htm; Centers for Disease Control and Prevention, *Spontaneous Abortions Possibly Related to Ingestion of Nitrate-Contaminated Well Water-La Grange County, Indiana 1991-1994,* Morbidity and Mortality Weekly, Report 45 (26) (1996), at 569-571 (linking high nitrate levels in Indiana well water near confinement operations to spontaneous abortions in humans), http://www.cdc.gov/mmwr/preview/mmwrhtml/0042839.htm.

[22] Iowa State University and The University of Iowa Study Group, Iowa Concentrated Animal Feeding Operations, Air Quality Study, Final Report (2002) ("Iowa Air Quality Study"), http//www.publichealth.uiowa.edu/ehsrc/CAFOstudy.htm.

[23] Iowa Air Quality Study at 122; *see also* Minnesota Planning Agency Environmental Quality Board, Final Animal Agriculture Generic Environmental Impact Statement (2002), ("Minnesota EIS for Animal Agriculture"), http://www.eqb.state.mn.us/geis/ for information concerning health impacts of particular AFO air pollutants.

[24] S. Wing & S. Wolf, Intensive Livestock Operations, Health, and Quality of Life Among Eastern North Carolina Residents, 108 Envtl. Health Persp. 223-38 (2000); *see also* K. Thu et al., A Control Study of the Physical and Mental Health of Residents Living Near a Large-Scale Swine Operation, 3 J. Agric. Safety & Health 1, 13-26 (1997).

[25] Iowa Air Quality Study at 122.

[26] EPA, *Ammonia Emission Factors from Swine Finishing Operations,* http://www.epa.gov/ttn/chief/conference/ei10/ammonia/harris.pdf.

[27] EPA, *National Emission Inventory—Ammonia Emissions from Animal Husbandry Operations, Draft Report,* http://www.epa.gov/ttn/chief/ap42/ch09/related/nh3inventorydraft—jan2004.pdf.

[28] Letter from Tom Lindley on behalf of Threemile Canyon Farms to EPA Region X, April 18, 2005.

[29] U.S. EPA, Toxics Release Inventory, 2003. Search performed at: <http://www.epa.gov/triexplorer/>.

[30] U.S. Department of Justice, *Ohio's Largest Egg Producer Agrees to Dramatic Air Pollution Reductions from Three Giant Facilities,* http://www.usdoj/opa/pr/2004/February/04—enrd—105.htm.

[31] Schiffman, S.S., et al., *Health Effects of Aerial Emissions from Animal Production and Waste Management Systems,* http://www.cals.ncsu.edu/waste—mgt/natlcenter/summary.pdf.

[32] Memo from Mario Jorquera to Scott Clardy (December 2, 2002).

[33] EPA, *Health and Environmental Impact of PM,* http://www.epa.gov/air/urbanair/pm/hlthl.html.

[34] EPA, *Chief Causes for Concern,* http://www.epa.gov/air/urbanair/pm/chf.html.

[35] Iowa State University and The University of Iowa Study Group, *Iowa Concentrated Animal Feeding Operations Air Quality Study* (February 2002), at 132.

[36] United States Public Health Service (1964).

[37] American Public Health Association, *Precautionary Moratorium on New Concentrated Animal Feed Operations,* 2003-7, http://www.alpha.org/legislative/policy/2003/2003-007.pdf.

[38] *Id.*

[39] *U.S. v. Reilly Tar & Chemical Corp.,* 546 F. Supp. 1100, 1112 (D. Minn. 1982); *see also Walls v. Waste Resource Corp.,* 823 F. 2d 977, 980 (6th Cir. 1987); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* 805 F.2d 1074, 1081 (1st Cir. 1986).

[40] *Id.*

[41] 42 U.S.C. § 9603(a).

[42] 42 U.S.C. § 9603; 40 C.F.R. § 302.4.

[43] 42 U.S.C. § 9603(f).

[44] 42 U.S.C. § 9604(a).

[45] 42 U.S.C. § 9607(a)(4)(A).

[46] 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1).

[47] *Sierra Club v. Tyson Foods, et al,* 299 F. Supp. 2d 693, 706 (W.D.Ky. 2003).

[48] 42 U.S.C. § 9601(22)(D).

[49] 42 U.S.C. § 11021(e)(5).

[50] *Sierra Club v. Tyson Foods, et al,* 299 F. Supp. 2d 693, 714 (W.D.Ky. 2003).

[51] *Id.*

[52] *City of Waco v. Dennis Schouten, et. al.,* No. W-04-CA-118, slip op. at 9 (W.D. Tx. 2005).

[53] *See, e.g., U.S. v. Iron Mountain Mines, et.al.,* 987 F. Supp. 1244 (E.D. Cal. 1997). (exemption held not apply to releases of metals altered by mining); *U.S. v W.R. Grace and Co.-Conn.,* 280 F. Supp. 2d 1149 (D. Mont. 2003) (exemption held not to apply to releases of asbestos and asbestos-contaminated vermiculite that was a by-product of vermiculite processing).

[54] USEPA, Office of Solid Waste and Emergency Response, *Questions and Answers on Release Notification Requirements and Reportable Quantity Adjustments,* EPA/540/R-94/005 (Jan. 1995).

[55] Congressional Research Service, *Air Quality Issues and Animal Agriculture: A Primer* (June 10, 2005).

[56] USEPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule (CAFOs), 66 Fed. Reg. 2960, 2968 (2001) [hereinafter USEPA, *CAFO Proposed Rule*].

[57] 42 U.S.C. § 9602 (a).

[58] Department of Justice, News Release, *Nation's Second Largest Hog Producer Reaches Settlement with U.S. and Citizen's Group* (Nov. 20, 2001), http://yosemite.epa.gov/opa/admpress.nsf/bf92f4e7d755207d8525701c005e38d7/db8bd3f214a2406d85256b0a0079a7ee!OpenDocument.

[59] *Id., see also* EPA, *Notice of Violation issued to Premium Standard Farms* (April 2000); EPA, *Clarification of Notice of Violation* (September 2000).

[60] *Id., see also* EPA, *Finding of Violation issued to Premium Standard Farms* (May 2000).

[61] Memo from Mario Jorquera to Scott Clardy (December 2, 2002).

[62] Premium Standard Farms, *Air Emissions Monitoring Completion Report* (Nov. 17, 2004).

[63] *Sierra Club v. Seaboard Farms,* 387 F. 3d 167 (10th Cir. 2004).

[64] *Sierra Club v. Tyson Foods, et al,* 299 F. Supp. 2d 693 (W.D.Ky. 2003).

[65] *City of Tulsa v. Tyson Food Inc., et. al.,* 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

[66] *Id.* at1272.

[67] *Id.* at 1285. Although the Court's ruling was vacated as part of a settlement agreement, the Court's reasoning may still be persuasive to other Courts.

[68] *City of Waco v. Dennis Schouten et. al.,* Civil Action No. W-04-CA-118 (W.D. Texas), First Amended Complaint (May 27, 2004).

[69] *City of Waco v. Dennis Schouten et. al.,* Civil Action No. W-04-CA-118 (W.D. Texas), Memorandum Opinion and Order at 8 (March 29, 2005).

[70] *Id.* at 9.

[71] *State of Oklahoma v. Tysons Foods, Inc. et.al.,* Civil Action No. 05CV0329 JOE-SAJ (N.D. Okla.), Complaint (June 18, 2005).

[72] Oklahoma Attorney General's Office, News Release, *AG Sues Poultry Industry for Polluting Oklahoma Waters* (June 13, 2005).

[73] *Id.*

[74] Complaint at ¶ 76.

[75] Complaint at ¶ 89.

[76] Southern Association of State Departments of Agriculture, *Clarifying CERCLA and EPCRA Do Not Apply to Animal Agriculture.*

[77] 42 U.S.C. § 9607 (f)(1).

[78] *See* 42 U.S.C. § 9607.

[79] 42 U.S.C. § 9607 (a)(4)(B).

[80] National Academy of Sciences, Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs (2003).

[81] USEPA, *Animal Feeding Operations Consent Agreement and Final Order; Notice* 70 Fed. Reg. 4958 (Jan. 31, 2005).

[82] USEPA, *Proposed Amendment to Section 118 of Superfund Amendments* (Oct. 2005) (Not Official Agency Position—Technical Assistance Only).

Mr. GILLMOR. Thank you very much, Ms. Merkel. We have 7 minutes until we are over there—supposed to be other there to vote. Let me ask both of the panel and to the members up here and the alternative. We are going to be gone a little while because there are three votes. I want to ascertain one thing from the members, one thing from the panelists. From the members, I want to know if you are actually going to come back and ask questions, and do you want me to ask the panel to wait. Second, I would like to ask the panelists if members have questions to submit to you in writing at a later date, would you be willing to respond in that manner? And everyone indicates in the affirmative. And I know, for example, Mr. Kouplen has a 7 p.m. plane, so we won't see you regardless, I presume. But do the members want to submit in writing, or——

Ms. SOLIS. But I do want to bring something up before we go.

Mr. GILLMOR. All right. I think Ms. Solis has one thing she does want to bring up, if you would do that——

Ms. SOLIS. Yes.

Mr. GILLMOR. [continuing] and then we can go.

Ms. SOLIS. Yeah. And I apologize, but I, you know, want to—I have empathy for many of you who have come out here, and I know that we are looking at some very important issues here. Small farming versus large industrial farms, and I would just say that we definitely need to have—it would be great to have some field hearings. I think that would be quite interesting. I am very concerned about what is going on in my own State of California in the Central Valley. But, I would like to ask the Chairman, since we have already agreed to put an amicus brief in the Waco case into the record, I would request unanimous consent that all other pleadings and orders of the court be placed in the record for the Waco case and the State of Oklahoma case, and ask for unanimous consent to the District Court Order dated March 14, 2003, in the Tulsa case also be placed into the record.

Mr. GILLMOR. All right. Let me ascertain, what is the volume that you are talking about? You know, we routinely let short things in, which I did, and your staff complained.

Ms. SOLIS. Is there a——

Mr. GILLMOR. And I am not going to get into a situation where we are entering large volumes of material, so I want to know what it is specifically you are asking for.

Mr. FRANDSEN. The Court Orders and the complaints that were filed?

Mr. GILLMOR. How big are they? How long?

Mr. FRANDSEN. They are not that big. I mean, we have got them over here if you want to see them.

Mr. GILLMOR. Let me see them. But, you know, I am trying to be open as I can, but I don't want to get back in this tit for tat about all this stuff we are going to be——

Ms. SOLIS. Does it look——

Mr. GILLMOR. [continuing] bearing in the record.

Mr. DINGELL. Mr. Chairman, with all respect, this is the first time I can recall this kind of situation occurring where the Chair said that Chair didn't want an adequate record.

Mr. GILLMOR. It is not a matter of an adequate record, Mr. Dingell. It is a matter of cluttering up the record. So, to me, it is a matter of the issue of the volume of stuff, and all the stuff is already probably in the record, including what Mr. Kouplen submitted, so I will not make an objection this time. But I sure will state for the benefit of my colleagues that I am not going to permit huge volumes to be put into the record on a——

Mr. DINGELL. Mr. Chairman, would you——

Mr. GILLMOR. [continuing] regular basis.

Mr. DINGELL. [continuing] yield to me?

Mr. GILLMOR. I would be happy to yield.

Mr. DINGELL. It certainly is not my purpose to inflict that kind of situation that on the Chair, and it certainly is not my purpose to lard the record with a lot of useless information, but other members do have a concern on this and I would hope the Chair would be kind to the members in the way Chair approaches these questions because from time to time, I like to put stuff in the record too, and I—it comforts me when I can read it and see it was there.

Mr. GILLMOR. Well, we normally do let materials in, and that would be the intent, but it is a matter of, I think, simply of good judgment on both sides.

Mr. DINGELL. If the Chair would yield further, I just hope that the Chair would be kind to us on this. This is very important.

Mr. GILLMOR. We certainly have an objective here, so, yes, Mr. Sullivan?

Mr. SULLIVAN. Thank you, Mr. Chairman, and I appreciate everyone for being here today. I will submit some questions, in particular to Mr. Kouplen and the Assistant Attorney General Ms. Hunter Burch, but I do want to state that this is very important, the Arkansas-Oklahoma situation. It is at a crisis and we want to make sure that we can work this out. I would like to see us do it without a lawsuit. I would like to see us do it where we can bring all parties together and get this done. I mean, there are problems, and we got to make sure that the watersheds are protected. And I hope that we can come together and get this resolved. I mean, it has been a long time coming, and I think we can get it done. We just need to start working, and I wish the EPA would be stronger in what they do, trying to get everybody together, but they obviously won't do that. And so I just want to make sure that we can get together. I will give you guys both questions and put it in the record and ask you to respond in writing. And I hope you make your plane.

Mr. GILLMOR. Mr. Dingell?

Mr. DINGELL. Mr. Chairman, I just wanted to ask just a couple of questions. I would like to have the permission of the Chair to submit questions to the panel members.

Mr. GILLMOR. Sure.

Mr. DINGELL. And for inclusion—and that the response be included in the record. Mr. Kouplen, I have listened to your comments with a great deal of interest. I have got a lot of small farms in my district and I want to protect them. But, by the same token, I don't feel that I have a particular need to support or to help these massive industrial farms to compete with my people, and to dispose of their waste in a way which constitutes a hazard. My question to you is you raise, you say, 250 cattle? Is that right?

Mr. KOUPLEN. That is right, sir.

Mr. DINGELL. Now, 250, are you under threat of any sort from the proposals that we are discussing with regard to either Oklahoma or Texas?

Mr. KOUPLEN. Not currently.

Mr. DINGELL. Not currently. Why do you say not currently? That you mean you just not under any threat for those things, and is there anything that makes you apprehensive that you will be?

Mr. KOUPLEN. It is my fear, Congressman, that if, you know, animal manure gets classified as hazardous waste—and I know that there is a big concern here from everyone about the size of operations—but it is my concern that if that ever gets——

Mr. DINGELL. Let us go into it. You use your animal waste for fertilizer, right?

Mr. KOUPLEN. No, sir.

Mr. DINGELL. No? What do you use it for?

Mr. KOUPLEN. My cattle, I have about 2,500 acres——

Mr. DINGELL. Okay.

Mr. KOUPLEN. [continuing] and I do not feed them——

Mr. DINGELL. So essentially fertilizer?

Mr. KOUPLEN. [continuing] in a feedlot. No, sir.

Mr. DINGELL. You apply it.

Mr. KOUPLEN. No.

Mr. DINGELL. You don't? What do you do with it?

Mr. KOUPLEN. It just falls where it falls.

Mr. DINGELL. Oh, so you just raise your cattle. It is a free range.

Mr. KOUPLEN. I do not fall under the CEFLAC regulations.

Mr. DINGELL. So I was just trying to figure out—so you really have, at this particular time, no great concern about your situation, because I have got—as I repeat, I have a bunch of small farmers up there, I want to protect. But, again, I don't want to take care of Montfort, and I don't want to take care of those good-hearted folks that caused so much trouble at Lake Waco, nor do I want to take particular concern about those wonderful folks that caused trouble in Oklahoma. They seem to be doing just fine, and, quite honestly, they are producing for a lot less than my people are producing. They are running some of them out of business, and they are polluting the waters. And I wonder, what are we going to do about that? Is it—where is—are you here to advocate for the family farmer, or are you here to advocate for Montfort or for some of the big folks? Which——

Mr. KOUPLEN. Well, look, I don't think any of us——

Mr. DINGELL. [continuing] side of this gate do you fall?

Mr. KOUPLEN. [continuing] in this room can deny that the dynamics of agriculture is changing. The dynamics of all industry in this country is changing, and——

Mr. DINGELL. I——

Mr. KOUPLEN. industries are getting bigger and bigger, and you have to—the economies of scale aren't what they used to be, and you have got to be—to be quite honest, a 250 cow/calf——

Mr. DINGELL. Well, just——

Mr. KOUPLEN. [continuing] herd is just big enough to survive.

Mr. DINGELL. Just to help me understand, are you talking here for the small farmer or are you talking here for the guy that has the great big huge corporate farm?

Mr. KOUPLEN. Well, a lot of the large farms are family farms.

Mr. DINGELL. Well, at what point do you get to be a farm that should be protected, and at what point are you a farm that you shouldn't be protected?

Mr. KOUPLEN. Well, there are——

Mr. DINGELL. How many animals?

Mr. KOUPLEN. There are——

Mr. DINGELL. How many tons of waste? What kinds of agriculture practices?

Mr. KOUPLEN. At certain numbers of livestock, you reach the limit where you become CAFOs, and every operation, whether it is a family operation or otherwise, once they meet those limits, they are already being regulated.

Mr. DINGELL. Mr. Chairman, I am using the time of the Committee. I thank you for your courtesy to me.

Mr. GILLMOR. Thank you, Mr. Dingell. Mr. Deal had——

Mr. DEAL. I would like to——

Mr. GILLMOR. [continuing] a question and then we will recess.

Mr. DEAL. I would like to briefly follow up that line of thought because it is all tied together. Mr. Stem, you said you had a cow/calf operation. I am sort of like Dr. Weaver. I grew up in FFA and 4H, et cetera. Cow/calf operation, to me, means that you sell the calf to somebody else.

Mr. STEM. Yes, sir.

Mr. DEAL. And I assume Mr. Kouplen does the same thing.

Mr. STEM. Yes, sir.

Mr. DEAL. Do you retain ownership in that feed out operation of your calves, or do you just simply sell the calf and they go to somebody else to feed them out?

Mr. STEM. We take them to the auction.

Mr. DEAL. And, so therefore, what you produce will wind up in a CAPO more than likely, is that right?

Mr. STEM. Yes, sir, it could.

Mr. DEAL. Do you think you ought to be assessed so much per head for any costs that are associated with these regulations that people are trying to impose on the people who buy your cattle?

Mr. STEM. Well, I believe that if the—whatever it is, beef cattle feed lot, whatever, if it is causing others to have cost, they wouldn't have otherwise. Yes, sir, I do.

Mr. DEAL. Well, that is a good volunteer right there to start with. I will end with that one. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you very much, Nathan, and I thank the panel for your patience in a long day.

[Whereupon, at 5:15 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

EPA RESPONSES TO
NOVEMBER 16, 2005 AFO HEARING FOLLOW UP QUESTIONS
HOUSE ENERGY AND COMMERCE COMMITTEE
SUBCOMMITTEE ON
ENVIRONMENT AND HAZARDOUS MATERIALS
UNITED STATES HOUSE OF REPRESENTATIVES

The Honorable Paul E. Gillmor

1. Mr. Breen, as you know, CERCLA section 102 gives the Administrator the authority to revise any of the reportable quantities under CERCLA. This is a huge deal because reporting requirements in section 103 are triggered by 102 listings. Your testimony stresses that prior to the consent agreements, you were only regulating ammonia in tanks that were being held on-farms for fertilizer purposes. Had EPA considered ammonia from animal wastes to be a CERCLA issue prior to the citizen suits? Had EPA prior to the consent agreements considered making any changes, pursuant to section 102, to address ammonia from agricultural waste?

Answer: Ammonia is designated under Clean Water Act Sec. 311(b)(2)(A), and is therefore a hazardous substance under CERCLA Sec.101(14), 40 CFR 302.4. However, except in one instance, EPA has not relied on CERCLA reporting authority as the primary reason to take action against an AFO owner or operator. Rather, citizen suits have brought attention to the issue that animal wastes that release ammonia at or above its Reportable Quantity are subject to CERCLA reporting authority. EPA had not considered, prior to the consent agreements, making any changes, pursuant to section 102, to specifically address ammonia from agricultural waste.

2. You stress in your testimony that EPA is not a party in any of the suits currently being litigated over CERCLA. Is there a reason for this? Does EPA not consider these suits meritorious, especially in light of EPA's "smart enforcement" policy that seeks to prioritize its enforcement actions based upon the greatest threats to human health and the environment?

Answer: There is a large volume of private party litigation under CERCLA and other environmental statutes. EPA rarely becomes a party to such litigation.

3. Your testimony states that in CERCLA's 25 year history that EPA has never filed a CERCLA Section 104 action – dealing with an emergency response – against an animal feeding operation. In fact, I am only aware of one RCRA Section 7001 – imminent hazard – action against a farming operation. That being the case, is it fair to say that EPA does not consider CERCLA emergency authority an appropriate response to environmental threats which may occur at animal feeding operations and that in fact, other environmental authorities address those concerns more appropriately?

Answer: While EPA has not taken an emergency response action under CERCLA Section 104 at an animal feeding operation, it is inaccurate to say that EPA does not consider CERCLA emergency authority to be an appropriate response to an environmental threat that may occur at an animal feeding operation. While other environmental authorities may be more appropriate in some circumstances, the decision on whether to use CERCLA emergency authority must be made on a case-by-case basis. To prescribe in advance of an actual environmental threat what is the most appropriate response authority would not be consistent with the National Contingency Plan (NCP).

4. What is the EPA estimate of the number of facilities that would be subject to the CERCLA reporting based on current information? What would the cost to producers be to do that reporting? Is the Agency capable of receiving all of those reports (and/or what will be the cost of receiving and acting on those reports?)

Answer: EPA does not currently have an estimate of the number of facilities that are subject to CERCLA reporting since it is unknown how many of these facilities would release a hazardous substance at or above the designated Reportable Quantity.

The current Information Collection Requests for "Notification of Episodic Releases of Oil and Hazardous Substances," and "Continuous Release Reporting Regulation under CERCLA," provide the Agency's best estimate of the burden associated with notification requirements under CERCLA section 103 once the data regarding ammonia emissions from livestock operations are available. For episodic releases, the estimated cost to the facility owner/operator making the notification is $166.99 per notification. Included in this estimate is the cost of making the telephone notification (2 hours) and the cost of recordkeeping (2.1 hours).

For continuous release reporting, the average estimated cost to the facility owner/operator making the notification over a three-year period is $5,096. It is important to note that this figure is for a "typical" respondent and assumes that they will report eight continuous hazardous substances releases in year one and experience a change in one release in the second and third years. This figure also includes providing an initial telephone notification, preparing an initial written report, preparing a follow-up written report, conducting annual evaluations, reporting other changes in information, and record keeping. Since it is likely that the number of continuous release reports at farms will be much less than estimated in the information collection request, we believe that the actual costs for a farm operation would be significantly less than the costs estimated in the information collection request.

The National Response Center receives the episodic and initial continuous release reports. The National Response Center has over 25 years of experience in handling tens of thousands of incoming reports of hazardous substance releases each year and thus, we would not anticipate any problems with the receipt of these reports. EPA Regional offices receive the written continuous release reports from the facilities.

Based on the same Information Collection Request estimates described above, the cost to the Government for episodic notifications is $39.49 per notification (1.0 hour) and for continuous release notifications the average over a three-year period is $294. EPA cannot provide an estimate for the cost of a response.

5. As I understand it, CERCLA has an exemption for the normal application of fertilizer already in it. Therefore, under CERCLA, would a party only be liable if they "over applied" fertilizer? If so, what constitutes over application? Where is that found in the statute? Wouldn't your same theory apply to commercial fertilizer, which I believe is exempt, if it is "over applied"? If not, why not?

Answer: The exemption for the "normal application of fertilizer" is found in CERCLA Sec.101(22)(D). It is one of four specific exclusions from the definition of "release." EPA has not taken a position on what might constitute "over application" of fertilizer for the purposes of Sec.101(22)(D).

6. Your testimony, after discussing the National Academy of Sciences study and recommendations, states that "EPA may use CERCLA authority to respond to certain catastrophic releases of hazardous substances or wastes such as from a lagoon failure near a public waterway." Could you please explain what you mean by this and how this is different from current practices?

Answer: CERCLA section 104(1)(B) authorizes the President to act, consistent with the National Contingency Plan, to remove, or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the National Contingency Plan which the President deems necessary to protect the public health or welfare or the environment. This authority, used to respond to certain catastrophic releases of hazardous substances consistent with the National Contingency Plan, reflects the Agency's current practice.

7. Under Section 122(g)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), there are certain parameters that shield a potentially responsible party (PRP) from either going into bankruptcy or being put out of business due to a CERCLA action. Since CERCLA Section 122(g)(7) only relates to actions taken by the Federal government against the PRP, does EPA read this bankruptcy protection as existing for suits brought under CERCLA Section 310, which allows citizen suit actions?

Answer: Section 122(g) of CERCLA deals with de minimis settlements with the United States. To our knowledge, it has never been applied to a citizen suit.

8. Also, since CERCLA Section 122(g) (7) protects a person's basic business model, would you consider a Federally-led CERCLA suit against someone (PRP) who was a legally defined CAFO under the Clean Water Act, to result in the PRP being able to continue as a legally defined CAFO, continued operation as a smaller, but legally defined AFO (animal feeding operation), or not at all?

Answer: If a CAFO sought an ability to pay settlement with EPA under section 122(g)(7) of CERCLA, the Agency would consider its September 30, 1997, ability to pay policy. Under that policy, a business party would generally not be required to dispose of assets that are currently used for the business purpose of the entity. Any decision to enter into an ability to pay settlement would be made on a case-by-case basis after a careful review of the party's overall financial situation. The Agency cannot pre-judge what constitutes a party's "basic business operations" in any particular case.

9. The term CAFO (Concentrated Animal Feeding Operation) is frequently used in the testimony before the Committee today. I understand CAFO is a specific legal term defined under the Clean Water Act. Can you please explain what the parameters of a CAFO are and the difference between a CAFO and an AFO? Also, is the agency aware of what USDA uses to define a family farm?

Answer: The National Pollutant Discharge Elimination System (NPDES) permit program, 40 CFR 122.23(b)(1) defines an AFO as an animal feeding operation that meets both of these conditions:

1. The animals are confined for at least 45 days during any 12-month period. The 45 days of confinement do not have to be 45 days in a row, and the 12-month period can be any consecutive 12 months.

2. Crops, forage growth, and other vegetation are not grown in the area where the animals are confined. This does not mean that any vegetation at all in a confinement area would keep an operation from being defined as an AFO. For example, a confinement area like a pen or feedlot that has only "incidental vegetation" (as defined by your permitting authority) would still be an AFO as long as the animals are confined for at least 45 days in any 12-month period. Pasture and rangeland operations are not AFOs because the animals are not confined or concentrated in an area where manure builds up. However, a pasture or grazing-based operation might also have additional areas such as feedlots, barns, or pens that meet the conditions described above to be defined as an AFO. Winter feedlots can still be AFOs even if the feedlot area is used to grow crops or forage when animals were not confined there. In the case of winter feedlots, the "no vegetation" condition applies to the time when animals are confined there.

What is a CAFO?

For a facility to be a CAFO under NPDES, it must first meet the regulatory definition of an AFO. A CAFO is an AFO that has certain characteristics. There are two ways for an AFO to be considered a CAFO: An AFO may be defined as a CAFO or an AFO may be designated a CAFO. See 40 C.F.R. 122.23(b)(2).

An AFO can be defined as a CAFO if it has a certain number of animals and it meets the other criteria contained in the regulations. The regulations set thresholds for size categories based on the number of animals confined at the operation for a total of 45 days or more in any 12-month period.

Large CAFOs

An operation is defined as a Large CAFO if it meets the regulatory definition of an AFO and meets the Large CAFO threshold for that animal type. See 40 C.F.R. 122.23(b)(4).
Medium CAFOs

An operation is defined as a Medium CAFO if it meets the regulatory definition of an AFO; meets the Medium CAFO thresholds for that animal type; and meets at least one of the following two criteria (called "discharge criteria"): a man-made ditch, pipe, or similar device carries manure or process wastewater from the operation to surface water or the animals come into contact with surface water that runs through the area where the animals are confined. See 40 C.F.R. 122.23(b)(6).

Which AFOs may be designated as CAFOs?

The second way for an AFO to be a CAFO is to be designated as a CAFO. If an AFO does not meet the definition of a Large or Medium CAFO but the permitting authority finds it to be a significant contributor of pollutants to surface waters, the permitting authority may designate that operation as a CAFO. To designate an AFO as a CAFO, the permitting authority must inspect the AFO and must find that the operation is a significant contributor of pollutants to surface waters. See 40 C.F.R. 122.23(c).

Family Farm

According to USDA, there is no official USDA definition of family farm. USDA's Economic Research Service (ERG) chooses one definition, however, and we suggest using ERS as the source. The following information is from the ERS website:
http://www.ers.usda.gov/Briefing/FarmStructure/Questions/familyfarms.htm

Q. What is a "family farm"?
A. There is no generally accepted definition of "family farm," and a variety of definitions, implicit and explicit, have been used by Congress, researchers, and others. Some of these definitions are summarized below:
1. All farms except large, nonfamily corporations (U.S. Congress, 1985)

2. Farms with no hired manager; no nonfamily corporations or cooperatives (Salant et al., 1986; Hoppe et al., 1996)

3. Farms using less than 1.5 person-years of hired labor; no hired manager (U.S. Congress, 1985)

4. Farms with less than 3.0 person-years of labor; family supplying at least half of labor (Irwin, 1973)

5. Farms with less than 1.5 to 2.0 family workers and the same or fewer number of hired

workers; buying and selling in the market; self-managed; tenancy not extremely high (Breimyer, 1991)

6. Farms where agricultural production is either the primary occupation of the operator (or is an important contributor to family income); that provide at least half-time employment for an operator, family member, or a hired laborer; and that are operated by no more than three extended families (Sumner, 1985).

ERS uses definition 2, which includes all farms except those with hired managers and those organized as nonfamily corporations or cooperatives. The farms included in definition 2 are closely held (legally controlled) by their operator and the operator's family. The operator and operator families of the excluded farms have limited say over the distribution of the net income or equity of the farms they operate.
Family farms include farms not operated by a hired manager that are:
Organized as a sole or family proprietorships.
Organized as partnerships.
Organized as family corporations.
Nonfamily farms include:
Farms organized as nonfamily corporations.
Farms organized as cooperatives, estates, trusts, and grazing associations.
Farms operated by hired managers.

Size restrictions

Other definitions exclude even more farms from consideration. Excluding farms based on hired labor, total labor, share of labor provided by the family, contracting arrangements, or tenure tends to eliminate larger farms. Excluding such farms would make sense only if the focus is small family farms. Conversely, including only operations where the operator's main occupation is farming, or where the farm provides at least half-time employment, would exclude smaller farms that are, nevertheless, classified as farms under the current U.S. farm definition.

References

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Breimyer, Harold F. "Is There a Family Farm Anymore?" Agricultural Technology and Family Farm Institute, *Rural Wisconsin's Economy and Society: The Influence of Policy and Technology*. Madison, Wisconsin, April 10, 1991.

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Sumner, D.A. "Farm Programs and Structural Issues," in *The 1985 Farm Legislation*. B. Gardner (ed.). Washington, DC: American Enterprise Institute, 1985.

U.S. Congress. Public Law 99-198, "Food Security Act of 1985," December 23, 1985.

Irwin, George D. "Viability of the Family Farm," 31st Agricultural Workers Conference, Tuskegee Institute, December 10-11, 1973.

The Honorable Heather Wilson

1. My state of New Mexico does not have state issued CAFO permits. As you know, the EPA issues permits to CAFOs in New Mexico and performs on-site inspections of these livestock and dairy farms. To my knowledge, EPA has not informed the dairy or livestock producers in my state that they (meaning the dairy and livestock producers) need to do anything more than fulfill the requirements of their federal CAFO permits in order to protect the environment from damage caused by the manure produced at these operations. Why has EPA been resistant to taking a more active role in clarifying this issue, especially in states like mine, if there are real threats to the environment being caused by manure from CAFOs?

Answer: EPA has limited authority to regulate the agricultural industry. National Pollutant Discharge Elimination System (NPDES) Permits, as defined in the Clean Water Act, only regulate the discharge of pollutants from point sources to waters of the United States. Such point sources of pollutants include large agricultural enterprises, which are known as concentrated animal feeding operations, or CAFOs, as defined by federal regulations (40 CFR 122). NPDES permits contain the necessary conditions to meet the technology requirements as specified in the Federal regulations (40 CFR 412) and the permits must contain additional limitations as necessary to achieve applicable water quality standards. (40 CFR 122.44). NPDES federal regulations do not address ground water quality. However, there is a pond liner provision in the EPA Region 6 NPDES CAFO permit for New Mexico that will protect from contamination those groundwaters that have the potential to be hydrologically connected to surface water. The State of New Mexico does issue ground water discharge permits intended to protect the state's ground water resources under the authority of the New Mexico Water Quality Act.

The Region is working with the State of New Mexico to identify the scope and cause of surface and ground water problems in the Lower Rio Grande Basin, as well as to develop ideas on how to correct those problems. In FY2005, the Region conducted two outreach efforts to assist the New Mexico dairy producers in complying with ground water and surface water regulations.

In addition, the Region has maintained an active dialogue with New Mexico livestock producers in the context of EPA efforts to revise the current New Mexico NPDES General Permit for CAFOs to comply with changes to the federal CAFO regulations. This dialogue has included discussions with producer representatives on best management practices and nutrient management planning as important tools to protect water quality. Continued active EPA dialogue with the livestock producers in cooperation with the USDA Natural Resources Conservation Service is planned for FY2006.

2. We've heard about the Air Consent Agreement that took place between some farmers and the EPA. Will this consent agreement have any impact on whether or not dairy farms and other farms are regulated under Superfund laws?

Answer: Dairy farms that sign up for the Air Compliance Agreement must comply with applicable laws just like the rest of the industry. The agreement will lead to more accurate data concerning emissions from farms, making it easier for farms to determine if their emissions are at or above the RQ for ammonia and/or hydrogen sulfide.

The Honorable John Sullivan

1. You detail EPA's actions to encourage settlement and mediation between the States of Oklahoma and Arkansas leading up to the State of Oklahoma filing federal litigation against the poultry industry on June 13, 2005? Since the lawsuit was filed, has EPA made any attempt to discourage this litigation?

Answer: Over a period of more than ten months, EPA Region 6 worked closely with senior officials from the States of Arkansas and Oklahoma to find a reasonable and mutually acceptable approach to reducing phosphates in those States' shared Scenic Rivers watersheds. The Region's efforts were successful with the signing of a Statement of Joint Principles and Actions by officials from both States on December 18, 2003. The poultry industry was not a party to the Statement.

EPA Region 6 continues to work with the States of Arkansas and Oklahoma to achieve the goal of reducing phosphates and thereby improving water quality in the States' shared watersheds and the Region remains committed to working with all members of the community, including the poultry industry, in furtherance of that goal. However, the Region has had no role in the litigation filed by the Oklahoma Attorney General against a number of private poultry companies, and has had no contact with the parties. We understand that there have been mediated discussions among the parties. If the parties would like the Region to play a facilitation role in this dispute, we would be happy to try to help.

2. In your testimony, you state the EPA does not have positions on many of the issues involved in the current federal litigation between the animal agriculture industry and states and municipalities. What issues in the litigation, if any, does the EPA have a position?

Answer: EPA is not a party to the litigation. EPA has not developed an Agency position on the issues being litigated.

The Honorable Charles F. Bass

1. How do the reporting requirements for air emissions under EPCRA coincide with the potential reporting requirements under EPA's Air Compliance Plan for livestock and poultry operations which is just being implemented? What are the differences in Clean Air emissions standards and EPCRA for dairy and other livestock farms?

Answer: Within 120 days after EPA publishes emissions-estimating methodologies, livestock industry members who sign up for the Compliance Agreement will be required to submit all qualifying releases of hydrogen sulfide and ammonia in accordance with section 304 of EPCRA. If application of emissions-estimating methodologies establishes that no notifications are required, the respondent shall so certify to EPA in writing within 60 days.

2. I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?

Answer: There is no categorical exemption from regulation under the Clean Air Act (CAA) and Clean Water Act (CWA) for livestock operations. Under the CAA, an AFO with emissions high enough to meet or exceed thresholds is obliged to apply for a Title V or NSR/PSD permit. Under the CWA, CAFOs that discharge pollutants into a water of the U.S. will need to obtain a permit. Many livestock operations however, do not meet these thresholds or do not discharge into a water of the U.S. and therefore will not require these permits. Both the CAA and CWA have imminent and substantial endangerment clauses that can be used in the event of imminent and substantial endangerment to human health.

CERCLA requires the reporting of releases of hazardous substances at or above their reportable quantities or if there is a substantial threat of such a release into the environment, or if pollutants or contaminants are released in an amount or manner that present an imminent and substantial danger to the public health or welfare. (see CERCLA §104(1)(A) and (B)). To the extent that dairy or any other operation has such releases, the statute would apply to them to the CERCLA reporting requirements. Under CERCLA, these releases of hazardous substances may be in manure, but manure itself is not considered a hazardous substance.

The Honorable Ralph M. Hall

1. You state in your testimony that the purpose of the release reporting requirements is to alert appropriate first responders and to keep state and local entities informed. However, not all chemical releases reported to the NRC are necessarily "emergencies." Does it make sense to require hundreds of thousands of release reports from animal agriculture since they would never result in an emergency response action?

Answer: As noted in EPA's testimony on page 2, not all chemical releases reported to the NRC are necessarily "emergencies." That would be true not only for animal feeding operations, but releases at chemical plants and other facilities. In addition, the regulations only require hazardous substance release reports from facilities that meet or exceed the CERCLA Reportable Quantity for those substances. Nevertheless, because decisions on whether to use CERCLA emergency response authority is made on a case-by-case basis, we cannot predict that a notification of a release of a hazardous substance from animal agriculture will never result in an emergency response action. Nor does EPA have data that supports the premise that hundreds of thousands of release reports would be required from animal feeding operations.

2. Is it possible that this type of reporting would jam the system, to the detriment of real emergency reporting?

Answer: To date, EPA has not experienced an overwhelming number of reports. The National Response Center has over 25 years of experience in handling tens of thousands of incoming reports of hazardous substance releases each year and thus, we would not anticipate any problems with the continued receipt of these reports.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. At the Subcommittee hearing on November 16, 2005, you were asked whether you agreed with the description of environmental and human health risks presented by large-scale concentrated animal feeding operations (CAFOs) as described in the Environmental Protection Agency's (EPA) Fact Sheet dated November 19, 2001, announcing a civil settlement between the U.S. EPA and Premium Standard Farms, Inc. and Continental Grain Company. The Fact Sheet described the human health and environmental risks as follows:

"Significant human health and environmental risks are generally associated with large-scale Concentrated Animal Feeding Operations (CAFOs). Improper handling of manure from feedlots, lagoons and improper land application can result in excessive nutrients (nitrogen and phosphorus); pathogens (i.e., fecal coli form); and other pollutants in the water. This pollution can kill fish, cause excessive algae growth, and contaminate drinking water. In addition, emissions of air pollutants from very large CAFOs may result in significant health effects for nearby residents."

During the hearing you responded that you would need to have the fact sheet "in front of me" and "be able to carefully read it" before you could provide an answer.

Now that you have had an opportunity to carefully read the EPA the Comprehensive Environmental Response, Compensation and Liability Act Fact Sheet, do you agree with its description of the human health and environmental risks associated with large-scale CAFOs? If not, please explain why not.

Answer: EPA believes that the fact sheet describes the human health and environmental risks that can be associated with operations that improperly handle manure from feedlots, lagoons and land application.

2. Please provide any other information EPA has relating to the human health or environment risks associated with large-scale CAFOs.

Answer: To EPA's knowledge, no official quantitative risk assessment or studies have been conducted to estimate the human health risks associated with large-scale CAFOs.

3. You were asked at the November 16 Subcommittee hearing what size city would generate waste approximately equal to the amount of animal waste generated by two million hogs. Please provide a response to the question.

Answer: EPA estimates that two million hogs produce a volume of manure equal to the solid waste stream of a U.S. city of about 2,667,000 million (that is, a city slightly smaller than Chicago). This estimate is calculated by dividing the average per person waste generation rate (4.5 lb/day) by EPA data on the amount of manure produced by 2,000,000 hogs per year.

4. What number of hogs or size of herd or flock would trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day?

Answer: As noted in EPA's testimony, a scientifically sound methodology for estimating or measuring air emissions from AFOs does not currently exist. This conclusion is based on a report by the National Academy of Sciences in which they concluded that scientifically sound and practical protocols for measuring air emissions from AFOs are inadequate. Therefore, EPA does not yet have the data to make a prediction as to the number of hogs or size of a herd or flock that would trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day.

5. Is EPA aware of any small farm operations, as opposed to large-scale industrialized CAFOs, that have triggered the reporting requirements for ammonia and hydrogen sulfide?

Answer: EPA is not aware of any small farm operations that have triggered the reporting requirements for ammonia and hydrogen sulfide. However, the size of operation is not included in the notification requirements, so the Agency would not be in a position to gather that data.

6. For Fiscal Year (FY) 2003, FY 2004, and FY 2005, please identify the name and location of each animal feeding operation that reported releases of ammonia pursuant to (a) Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and (b) Section 304 of the Emergency Planning and Community Right to Know Act (EPCRA) and provide the amount of the ammonia releases reported.

Answer: EPA's data is collected in Calendar Year (CY) rather than Fiscal Year (FY) format and was extracted from the public National Response Center (NRC) web site. The NRC is responsible for receiving the telephone notifications of the release. EPCRA reports are submitted to State and local governments; therefore, EPA does not have data on those reports.

CY 2003 – There were no reports of ammonia released from animal feeding operations under CERCLA.

CY 2004 -

Name	Location	Number of Reports from Facility	Ammonia released (pounds)
Buchannan Livestock	69 W Church St., Jasper, GA 30143	4 notifications on 2/4/04 regarding release on 11/07/03	Unknown amount

Circle Four Farms	341 South Main St Millford, UT 84751	1 notification on 8/30/04 regarding release on 8/30/04 from 25 farms. 25 notifications on 12/31/04 regarding release on 8/30/04 – location correction to notification made on 8/30/04 – Initial Continuous Release report	Unknown amount (continuous release of ammonia from hog lagoons)
Mapleleaf Dairy Inc	6832 Highway X, Cleveland, WI 53015	1 notification on 1/23/04 regarding release that occurred 4/15/97. 1 notification on 3/1/04 regarding release that occurred 4/1/97. – Initial Continuous Release report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Summers Nursery Farm, Harris, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Wade Farm Princeton, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount

Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Wiles Farm Princeton, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Scott Colby Farm Route 1 Jamesport, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Sharp Farm Jamesport, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Hickory Creek Farm Princeton, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Denver Miller Farm Princeton, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount

Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Overlook Ranch Newton, MO	1 notification on 11/04/04 regarding release that occurred on 11/04/04-Initial Continuous Release Report	Unknown amount
Premium Standard Farms 13301 US Hwy 87, Dalheart, TX 79022	205 South Sedane Lane, Dalheart, TX	1 notification on 10/05/04 regarding release that occurred on 10/05/04 – Initial Continuous Release Report	100 pounds/day
Premium Standard Farms 13301 US Hwy 87, Dalheart, TX 79022	S4 Sight, Dalheart, TX	1 notification on 10/05/04 regarding release that occurred on 10/05/04 – Initial Continuous Release Report	100 pounds/day
Premium Standard Farms 13301 US Hwy 87, Dalheart, TX 79022	Multiplier Finish Sight, Dalheart, TX	1 notification on 10/05/04 regarding release that occurred on 10/05/04 – Initial Continuous Release Report	100 pounds/day
Premium Standard Farms 13301 US Hwy 87, Dalheart, TX 79022	Hyplanes Nursery Dalheart, TX	1 notification on 10/05/04 regarding release that occurred on 10/05/04 – Initial Continuous Release Report	100 pounds/day
Stirman Adams	3634 Ky Highway Calhoun, KY	1 notification on 2/04/04 regarding release that occurred on 11//07/03	Unknown amount

Tyson Chicken 14660 US 41 S Robards, KY	4200 Isley Rd Dawson Springs, KY	1 notification on 1/26/04 regarding release that occurred on 1/26/04-Initial Continuous Release Report	78.4 pounds/day
Tyson Chicken 14660 US 41 S Robards, KY	Tyson Chicken Farm 4, Dawson Springs, KY	1 notification on 1/26/04 regarding release that occurred on 1/26/04-Initial Continuous Release Report	78.4 pounds/day
Tyson Chicken 14660 US 41 S Robards, KY	Chicken Farm 5, Dawson Springs, KY	1 notification on 1/26/04 regarding release that occurred on 1/26/04-Initial Continuous Release Report	78.4 pounds/day

CY 2005-

Name	Location	Number of Reports from Facility	Ammonia released (pounds)
ANC Sytsma Dairy	6160 Vanbell Rd Sunny Side, WA	1 notification on 7/28/05 regarding release that occurred on 7/28/05-Initial Continuous Release Report	165,000 pounds/year
Bar E Dairy	78 S Reynolds Rd Othello, WA	1 notification on 10/06/05 regarding release that occurred on 1/01/05-Continuous Release Report	Unknown
Coachlight Farms	824 Brooks Rd Iowa Falls, IA	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	Unknown

CY One Farms, LLC	30232 Grand Ave Aplington, IA	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	100 pounds/day
D&A Dairy	3001 Dekker Rd Outlook, WA	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	262,800 pounds/year
Elberta Valley AG	16100 S W Elberta, UT	1 notification on 08/11/05 regarding release that occurred on 08/11/05-Initial Continuous Release Report	Unknown
Fenceline Farms	824 Brooks Rd Iowa Falls	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	100 pound/day
Golob Dairy	500 Nelson Rd Granger, WA	1 notification on 08/09/05 regarding release that occurred on 08/09/05-Initial Continuous Release Report	408 pounds/day
Grand Prix Farms, LLC	824 Brooks Rd Iowa Falls, IA	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	100 pounds/day

Hofstra Dairy	28408 Fern Bluff Rd, Monroe, WA	1 notification on 06/28/05 regarding release that occurred on 01/01/05-Initial Continuous Release Report	Unknown
Insignia Farms	824 Brooks Rd Iowa Falls, IA	1 notification on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	100 pounds/day
Iowa Select Farms	P.O. Box 400 Iowa Falls, IA	3 notifications on 08/31/05 regarding release that occurred on 08/31/05-Initial Continuous Release Report	100 pounds/day
Purdue Farms	7858 S Meridian Rd Oakland City, IN	1 notification on 11/11/05 regarding release that occurred on 11/11/05	Unknown
Scheenstra Farms	2850 Alexander Rd Sunnyside, WA	1 notification on 08/15/05 regarding release that occurred on 01/01/99-Initial Continuous Release Report	360 pounds/day
Terry Koons Farms	RRTE 1, Box 34, Switz City, IN	1 notification on 06/29/05 regarding release that occurred on 06/29/05-Initial Continuous Release Report	100 pounds/day
Three Mile Farms	75906 Threemile Rd, Boardman, OR	1 notification on 03/29/05 regarding release that occurred on 03/29/05	15,500 pounds/day

7. Please identify for FY 2003, FY 2004, and FY 2005 the name and location of each animal feeding operation that reported releases of hydrogen sulfide pursuant to (a) section 103 of CERCLA, and (b) section 304 of EPCRA, and provide the amount of the hydrogen sulfide releases reported.

Answer: EPA's data is collected in Calendar Year (CY) rather than Fiscal Year (FY) format and was extracted from the public National Response Center (NRC) web site. The NRC is responsible for receiving the telephone notifications of the release. EPCRA reports are submitted to State and local governments; therefore, EPA does not have data on those reports.

CY 2003 – There were no reports of hydrogen sulfide released from animal feeding operations under CERCLA.

CY 2004 – All of the facilities in this table released both Hydrogen Sulfide and Ammonia:

Name	Location	Hydrogen Sulfide and Ammonia released (pounds)
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Badger – Wolf Farm Newton, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Brantley Farm Newton, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Green Hills Farm Unionville, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Hedgewood Farm Princeton, MO	Unknown amount-Initial Continuous Release Report

Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Locust Ridge Farm Harris, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Somerset Farm Powersville, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Peach Perkins Farm Newton, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	South Meadows Farm Browning, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Terre Haute Farm Lucerne, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Valley View Farm Green Castle, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Whitetail Farm Unionville, MO	Unknown amount-Initial Continuous Release Report

Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Ruckman Farm Albany, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	South Meadows Farm Browning, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms 805 Pennsylvania Ave, Suite 200, Kansas City, MO 64105	Homan Farm King City, MO	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	S3/S4 Farm Wallace, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Buffalo Ridge/S6 Farm Cameron, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	S5 Farm Lillington, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	S1/S2 Farm Faison, NC	Unknown amount-Initial Continuous Release Report

Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Goshen Ridge Farm Mount Olive, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Mills Farm Chocowinity, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Multiplier Farm Tarboro, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Southern Maid Farm Cordele, GA	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	Bladen Springs Farm Council, NC	Unknown amount-Initial Continuous Release Report
Premium Standard Farms of NC PO Box 349 Clinton, NC 28329	M1 Farm Raeford, NC	Unknown amount-Initial Continuous Release Report
Smith Brothers Inc PO Box 778 Kent, WA 99357	11792 Road Royal City, WA	Unknown amount-Initial Continuous Release Report

CY 2005 – All of the facilities in this table released both Hydrogen Sulfide and Ammonia:

Name	Location	Hydrogen Sulfide and Ammonia released (pounds)

Insignia Farms, LLC 824 Brooks Road Iowa Falls, IA	Alden, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Iowa Select Farms 811 South Oak St Iowa Falls, IA	Dumont, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Iowa Select Farms 811 South Oak St Iowa Falls, IA	Allison, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
JJM Farms, LLC 1307 Scenic View Dr Iowa Falls, IA	Clarksville, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Maridale Farms, LLC 2843 S Bayshore Dr Coconut Grove, FL	Deloit, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Omega One, LLC 803 N Shore Dr Clear Lake, IA	Rembrandt, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Omega One, LLC 803 N Shore Dr Clear Lake, IA	McIntire, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Providence Farms, LLC 59211 300th St Cambidge, IA	Union, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report
Skylimit Investments, LLC 1107 Siloam Ave Iowa Falls, IA	Ida Grove, IA	25 pounds/day (HS) 100 pounds/day (A) Initial Continuous Release Report

8. At the November 16 Subcommittee hearing, you testified that in FY 2004 with respect to ammonia reports from fixed sources "we were able to confirm that 45 were from animal feeding operations, six episodic, and six continuous."

Please identify the 45 companies that reported and the amounts they reported and describe the distinction between episodic and continuous releases, and the regulatory requirements that apply to each.

Answer: The following is the list of companies that reported. Some may have reported more than once which is why there are less than 45 companies reporting and some companies made multiple reports in one call which is why the total reports below is greater than 45. The data provided at the hearing were based on counting the fields downloaded from the NRC's public website; whereas the information gathered to respond to these more specific questions was pulled from the NRC public reports on the incident. The NRC incident reports appear to be more conclusive.

1) Buchannan Livestock (episodic, 4 reports)
2) Circle Four Farms (continuous, 25 reports)
3) Maple Leaf Dairy Inc (episodic, 2 reports)
4) Premium Standard Farms, MO (continuous, 26 reports)
5) Premium Standard Farms, NC (continuous, 10 reports)
6) Stirman Adams (episodic, 1 report)
7) Smith Brothers, Inc (continuous, 1 report)
8) Tyson Chicken (continuous, 3 reports)

Episodic reports are a call to the NRC about a release that has occurred at or above an RQ during any 24 hour period; whereas, continuous release notifications are the initial call to the NRC which is then followed up with a written report to the EPA Regional Office where the release is occurring describing a release of a more continuous nature. The continuous release notifications allow a facility owner/operator to report their releases in a manner that reduces burden because they don't have to call each 24 hour period.

9. In your testimony at the November 16 hearing, you said in response to Rep. Dingell's question of whether the Administration has provided guidance to small farmers that have animal feeding operations that "we haven't provided sufficient guidance. I think we can do better."

(a) What guidance, if any, has the Administration provided to small farmers with respect to their reporting obligations under CERCLA or EPCRA?

(b) Please provide a copy of any such guidance.

(c) When you state that you can do better, please specifically detail what you intend to do "better" in providing guidance to small farmers as to whether they have anything to fear from the reporting requirements and, if so, under what circumstances they likely would have to report.

(d) When specifically do you intend to provide guidance to address the concerns of small farmers?

Answer: The Agency has guidance on continuous release reporting available on its web site (http://www.epa.gov/superfund/resources/release/faciliti.htm). The guidance is not specific to small farmers with respect to their reporting obligations under CERCLA and EPCRA. Once the emissions study has been completed, the Agency will be able to provide guidance to all farmers, including small farmers, with respect to their reporting obligations under CERCLA and EPCRA, within 18 months of completion of the study.

10. Does EPA have a system where a company with an animal feeding operation can report electronically releases above the reportable quantity limit?

Answer: No, the Agency does not currently have a system where a company with an animal feeding operation (or any operation) can report electronically regarding releases above the reportable quantity limit.

11. Please provide an estimate of how much time it would take a company with a release above the reportable quantity limit to file the required report.

Answer: An episodic release notification requires a telephone report to the National Response Center. Continuous release reporting is more detailed, but significantly reduces the reporting burden overall. The current Information Collection Requests for "Notification of Episodic Releases of Oil and Hazardous Substances," and "Continuous Release Reporting Regulation under CERCLA," provides the Agency's best estimate of the burden associated with notification requirements under CERCLA section 103.

For episodic releases, the estimated cost to the facility owner/operator making the notification is $166.99 per notification. Included in this estimate is the cost of making the telephone notification (2 hours) and the cost of recordkeeping (2.1 hours). For continuous release reporting, the average estimated cost to the facility owner/operator making the notification over a three-year period is $5,096. It is important to note that this figure is for a "typical" respondent and assumes that they will report eight continuous hazardous substances releases in year one and experience a change in one release in the second and third years. This figure also includes providing an initial telephone notification, preparing an initial written report, preparing a follow-up written report, conducting annual evaluations, reporting other changes in information, and record keeping.

Since it is likely that the number of continuous release reports at farms will be much less than estimated in the information collection request, we believe that the actual costs for a farm operation would be significantly less than the costs estimated in the information collection request.

12. Are there any regulatory consequences under Federal law that follow the reporting of releases of ammonia or hydrogen sulphide above reportable quantity limits under CERCLA or EPCRA?

Answer: There are no prescriptive regulatory consequences under Federal law that follow the reporting of releases of ammonia or hydrogen sulfide, or any other hazardous substance or extremely hazardous substance, above reportable quantity limits under CERCLA or EPCRA. There could, however, be costs associated with any Federal response that is undertaken which results from the release of ammonia or hydrogen sulfide above the reportable quantity limits.

13. Are there any regulatory consequences under State law that directly flow from or follow the reporting of releases of hazardous substances under CERCLA or extremely hazardous substances under EPCRA that are above the reportable quantity limit?

Answer: EPA is not aware of any specific regulatory consequences under State law that directly flow from or follow the reporting of releases of hazardous substances under CERCLA or extremely hazardous substances under EPCRA that are above the reportable quantity limit.

14. The American Heritage Dictionary definition of "manure" is "animal dung, compost, or other material used to fertilize soil." The Webster's II New College Dictionary definition of "manure" is "material for fertilizing soil, as animal dung or compost." Does EPA believe "manure" is a fertilizer for the purpose of CERCLA, Section 101(22)? If not, please specifically state the reasons why not.

Answer: Although EPA is aware that many farmers use "manure" as a fertilizer, the Agency has not taken a position on whether "manure" is a fertilizer with respect to CERCLA section 101(22).

15. At the November 16 Subcommittee hearing, in response to a question from Rep. Solis, you testified that you wanted to "double check" whether the Superfund definition of "release" excludes the "normal application of fertilizer." Now that you have had the opportunity to double check, do you agree that the Superfund definition of "release" excludes the "normal application of fertilizer"?

Answer: Yes, EPA agrees that the CERCLA definition of "release" excludes the "normal application of fertilizer."

16. Has EPA ever published guidance or interpreted in any manner the exception from the definition of "release" for "the normal application of fertilizer"? If so, please provide any such guidance or interpretation.

Answer: No, EPA has not published guidance or interpreted in any manner the exclusion from the definition of "release" for "the normal application of fertilizer."

17. Is the EPA aware of any legislative history with respect to the exclusion from the term "release" for the "normal application of fertilizer" (CERCLA Section 101(22))? If so, please provide the legislative history.

Answer: Yes, EPA is aware of legislative history with respect to the exclusion from the term "release" for the "normal application of fertilizer" (CERCLA section 101(22)). The specific excerpt from the "Senate Report No. 96-848, to accompany S. 1480, the Environmental Emergency Response Act, by the Committee on Environment and Public Works, 96th Cong., 2d Sess., July 13, 1980" is attached.

18. Has EPA ever taken a position or expressed a view, formal or informal, in any administrative or other civil proceeding with respect to the interpretation of "the

normal application of fertilizer" exclusion in CERCLA Section 101(22)?

Answer: EPA has not taken a position or expressed a view, formal or informal, in any administrative or other civil proceeding with respect to the interpretation of "the normal application of fertilizer" exclusion in CERCLA section 101(22).

19. Is EPA aware of any private litigation where the "normal application of fertilizer" exclusion from the definition of "release" has been an issue? If so, please cite any such cases and describe any administrative or judicial interpretations of the exclusion for "the normal application of fertilizer."

Answer: While EPA is aware that private litigation is ongoing, the Agency is not aware of all of the litigation that may be underway. EPA is not a party to or otherwise involved in this private litigation. Therefore, the Agency is not aware of whether this issue, in particular, has been raised in any of the private litigation.

20. Does EPA support treating "manure" the same as chemical or other commercial fertilizers for the purpose of CERCLA and, in particular, for the purpose of the exclusion from the definition of "release" for "the normal application of fertilizer"?

Answer: EPA has not taken a position on what constitutes the normal application of fertilizer.

21. The reporting requirements are for "hazardous substances" under CERCLA Section 103 and are for "extremely hazardous substances" under EPCRA. Both ammonia and hydrogen sulfide are listed as "hazardous substances" under CERCLA and "extremely hazardous substances" under EPCRA. Does EPA support differentiating among industries for the reporting of releases of the same "hazardous substance" or "extremely hazardous substance"? If so, please explain on what basis you support different treatment among industries for reporting requirements.

Answer: CERCLA and EPCRA do not differentiate among industries for the reporting of releases of the same "hazardous substance" or "extremely hazardous substance." If the Agency were to make that determination, EPA would be required to do so through regulation.

22. If manure is consolidated into a big lagoon, does EPA consider that circumstance "a naturally occurring substance in its unaltered state . . . from a location where it is naturally found"?

Answer: EPA has not taken a position as to whether manure, consolidated into a big lagoon is "a naturally occurring substance in its unaltered state ... from a location where it is naturally found." However, there is a qualified limitation of CERCLA response authority in CERCLA §104(a)(3) regarding "a release or threat of release ... of a naturally occurring substance in its unaltered form or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." CERCLA section 104(a)(4) outlines the circumstances when this qualified limitation of response authority may no longer apply (e.g., in an emergency). EPA has never responded to such a release of a naturally occurring substance. In any case, the qualified limitation of response authority is not tied to the reporting requirements of CERCLA and EPCRA.

23. Is EPA aware that substances such as phosphorus are added to the feed at animal feeding operations? If so, please describe the types of animal feeding operations that add phosphorous to the feed.

Answer: Yes, EPA is aware that phosphorus (P) is added to animal feed. It is a mineral that is required for normal metabolism. Veterinarians have told farmers with problems with dairy cow breed-back, or keeping calves to parturition, that they need more phosphorus in the diet. Swine and poultry do not have enzymes in the gut to make the phosphorus found in plant materials available to animals, so this phosphorus passes through in the feces. Mineral phosphorus (dicalcium phosphate, oyster shell, etc.) has always been added to give the animal the phosphorus that it needs. Phytase, and other similar products, make the phosphorus found in the plant material available to the animal, and therefore the amount of mineral phosphorus added to the diet can be reduced.

According to discussions with the Natural Resource Conservation Service, the swine and poultry industries by and large did not use Phytase until other similar products became available thus driving down the price and making their use more economical, except where it was regulated by state law, i.e., Maryland. We see estimates that approximately 70% of the broiler industry, 50% of the swine industry and 50% of the layer and turkey industries are using Phytase. One may find corresponding manure analyses from broilers showing a drop from 36-38 lbs of P/ton, pre-Phytase, to 23-26 lbs. of P/ton, post-Phytase.

24. Has EPA issued any guidance or a formal or informal interpretation of the term "naturally occurring substance" as it is used in CERCLA Section 104(a)(3)(A)? If so, please provide any such guidance or interpretation.

Answer: No, EPA has not issued any guidance or a formal or informal interpretation of the term "naturally occurring substance" as it is used in CERCLA section 104(a)(3)(A).

25. Has EPA or the Department of Justice taken a position or expressed a view, formal or informal, on the term "naturally occurring substance" as used in CERCLA, Section 104(a)(3)(A), in any administrative or civil action? If so, please provide any document that reflects such position or view.

EPA and DOJ have taken positions or expressed views on the term "naturally occurring substance" in two civil actions in which the United States was a party, and the third case provides the Court's position on burden of proof:

(1) *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528 (E. D. Calif. 1992) and 987 F. Supp. 1244 (E. D. Calif. 1997). This CERCLA cost recovery action concerns a mine at which intensive mining activity caused severe acid mine drainage (AMD) that posed a threat to the environment. The 1992 opinion granted partial summary judgment to the United States on defendant mining company's defense based on section 104(a)(3)(A) of CERCLA. According to this opinion, the United States took the position

that although the defendant is not liable for the costs of responding to releases of naturally occurring substances, this defense was not applicable in this case. The Federal government submitted evidence that AMD flowing from the mine, although it consisted of naturally occurring substances, was not itself naturally occurring but rather was created by the mining. The 1997 opinion granted partial summary judgment to the United States when the mining company tried again to litigate the section 104(a)(3)(A) issue, finding that the law of the case doctrine applies. According to this opinion, while the United States argued that the 3 Records of Decision (RODs) issued to date for the site targeted contamination from the mine workings and mining waste piles, the 1992 opinion found that releases from mining activity are not naturally occurring, and therefore the law of the case doctrine precludes the mining company from re-litigating the section 104(a)(3)(A) issue.

(2) United States v. W.R. Grace & Company, 280 F. Supp. 1149 (D. Montana 2003). The court found that defendant corporations were liable under CERCLA for the cleanup of asbestos at the Libby Asbestos Site. The court found that EPA's response actions at the site did not conflict with the limitation on responses set forth in section 104(a)(3)(A) of CERCLA, reasoning that evidence presented at trial by the Federal government demonstrated that the actions were taken in response to releases and threats of releases associated with mined and processed vermiculite, not to a "naturally occurring substance in its unaltered form."

(3) United States v. Louisiana-Pacific Corporation, 1994 U.S. Dist. LEXIS 20590 (E.D. Calif. 1994). Citing the private litigation listed in the Response to Question 26, below, the court stated that there are two ways to view section 104(a)(3)(A) of CERCLA, either as limiting EPA's authority to respond to naturally occurring substances, or as a legislative declaration that no release occurs where there are only naturally occurring substances. In either case, the court says that plaintiffs bear the burden of demonstrating that a hazardous substance (in this case, asbestos) was not a naturally occurring substance. However, the court rejects defendants' argument that, in the absence of background studies, plaintiffs cannot prove that there were greater levels of arsenic present than occurred naturally, and denies defendants' summary judgment motion on this issue.

26. Is EPA aware of any private litigation where the term "naturally occurring substance" as used in CERCLA, Section 104(a)(3)(A), has been an issue and/or has been discussed? If so, please identify the case and provide a citation for the case, if available.

Answer: The Agency is aware of the following private litigation in which this term was at issue and/or was discussed: *Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377 (E.D. Calif. 1991).* EPA is not a party to or otherwise involved in this private litigation.

27. Is it correct that EPA staff in a meeting on November 8, 2005, informed the Committee staff that the farm industry, particularly the swine industry, requested and successfully negotiated to include CERCLA and EPCRA in the Animal Feeding Operations Consent Agreement and Final Order (70 FR 5948)? If so, please identify

the specific companies or associations that requested to include CERCLA and EPCRA in the Animal Feeding Operations Consent Agreement and Final Order.

Answer: Yes. The representatives of the following entities negotiated with EPA to include CERCLA and EPCRA in the Animal Feeding Operations Consent Agreement and Final Order:

1. National Chicken Council
2. United Egg Producers
3. National Turkey Federation
4. U.S. Poultry and Egg Association
5. California Poultry Federation
6. National Pork Producers Council
7. National Milk Producers Federation

28. What are the reasons that led EPA and the farm industry to negotiate the Animal Feeding Operations Consent Agreement?

Answer: In recent years, the increased size and consolidation of agricultural operations, including poultry, swine, and dairy operations, have been the focus of an increasing number of citizen complaints and concerns about possible health impacts. In December of 2001, EPA and the U.S. Department of Agriculture asked the National Academy of Sciences (NAS) to review and evaluate the scientific basis for estimating emissions of various air pollutants from AFOs. The NAS issued its final report in February 2003 and concluded that scientifically sound and practical protocols needed to be developed for measuring air emissions from AFOs. These findings posed problems for EPA regulation of AFOs. EPA began reviewing conceptual enforcement agreements initiated by livestock groups, to specifically address the data and emissions-estimating methodology needs cited by the NAS, while bringing a large segment of the AFO industry into compliance with the Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Emergency Planning and Community Right to Know Act (EPCRA).

29. Please identify the approximately 2,700 companies that are signatories or have submitted proposed agreements to EPA for the Animal Feeding Operations Consent Agreement.

Answer: EPA identified 20 settling respondents when these agreements were filed with EPA's Environmental Appeals Board (EAB). On Friday, Jan. 27, 2006, the EPA's Environmental Appeals Board (EAB) approved the first 20 Air Compliance Agreements. These 20 Agreements are comprised of 10 agreements from the swine industry, and 10 agreements from the egg-laying industry. EPA is evaluating the remaining agreements and plans to send those satisfying the requirements for participation to the EAB for approval as soon as possible. The names of the first set of 20 Respondents submitted to the EAB are as follows:

Egg Layers:

1. P & W Eggs
   2313 Hilltop
   Anita, Iowa 50020

2. MCM Poultry Farm
   5611 Peck Road
   Arcadia, CA 91006-5851

3. Water Works
   2104 E 300 South
   Portland, IN 47371

4. Bob Wendel & Son's Poultry
   14830 Cochran Road
   New Weston, OH 45348

5. K-Brand Farms
   715 Glen Wild Road
   Box 119
   WoodRidge, NY 12789

6. Henningsen Foods, Inc.
   Shell Egg Division
   851 Third Street
   P.O. Box 70
   David City, NE 68632

7. Lennartz Farms
   3178 St. Peter Rd.
   Ft. Recovery, Ohio 45846

8. Center Fresh Egg Farm, LLP
   546 9th Ave. East
   Oskaloosa, Iowa 52577

9. Badgett Enterprises LTD
   743 Mercer Darke County Line Rd.
   Ft. Recovery, OH 45846

10. Greg B. Nelson
    8690 Quail Circle
    Manhattan, KS 66502

Swine:

11. Fairway Farms
    328 Monterey Rd.
    Franklin, KY 42134

12. Brenton Brothers, Inc.
    P.O. Box 190 - 1415 Walnut
    Dalles Center, Iowa 50063

13. Roe Farm, Inc.
    72368 110th St.
    LeRoy, MN 55951

14. Terry Finnerty
    10347 W. SR 26
    Dunkirk, IN 47336

15. Jerry and Ruth Warren
    6873 E. 625 N
    Union City, IN 47390

16. E & S Swine, Inc.
    2492 Mobleys Bridge Rd.
    Grimesland, N.C. 27837

17. C & C Farms
    4201 Hayes Mill Rd.
    Godwin, N.C. 28344

18. Kermit Williamson Farm
    17 Pond Lane Rd.
    Clinton, N.C. 28328

19. James A. Zoltenko
    RR1, Box 106
    Courtland, KS 66939

20. Kober Farms LLC
    8990 Peach Ridge
    Sparta, MI 49345

30. Does the Clean Air Act (CAA) or the Clean Water Act provide authority for State or Federal trustees to recover damages for injury to, destruction of, or loss of natural resources? If so, please cite the specific authority under the Clean Air Act or the Clean Water Act.

Answer: The CAA does not contain a provision authorizing State or Federal Trustees to seek recovery of damages for injury to, or destruction of, natural resources. The Clean Water Act also does not contain a provision authorizing State or Federal Trustees to recover damages for injury to, or destruction of, natural resources. In 1990, Section 311 of the Clean Water Act was amended and supplemented by the Oil Pollution Act, which does allow State and Federal Trustees to recover damages for injury to, and destruction of, natural resources as a result of oil spills to navigable waters.

31. Have any companies in the farm community asked EPA and the Administration to issue guidance to further explain how the term "normal application of fertilizer" should be interpreted for the purpose of the Superfund statute? If so, please describe the specific request, the date of the request, and the company or organization which made the request.

Answer: EPA has not been asked by any companies in the farm community to issue guidance to further explain how the term "normal application of fertilizer" should be interpreted for the purpose of the Superfund statute.

32. Does the Superfund statute authorize or permit citizen suit actions for natural resource damages?

Answer: No, CERCLA does not authorize or permit citizen suit actions for natural resource damages.

33. Does EPA agree that there can be no recovery of response costs or damages under the Superfund statute (Section 107(j)) for "federally permitted releases" as defined in Section 101(10)?

Answer: Yes, as long as the release is in compliance with the permit. However, such costs and damages may be recoverable under other Federal or State laws, including common law.

34. Would a discharge permitted under Section 402 of the Clean Water Act (National Pollutant Discharge Elimination System) qualify as a "federally permitted release" under Superfund?

Answer: Yes. CERCLA section 101(10) states in part that, "[t]he term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33. Section 1342 of Title 33 is also known as Federal Water Pollution Control Act section 402 – National Pollutant Discharge Elimination System (NPDES).

35. Does EPA normally or routinely issue Clean Water Act permits for discharges or releases of phosphorus or phosphorus compounds from CAFOs? Please identify any permits EPA has issued for discharges or releases of phosphorus or phosphorus compounds from CAFOs.

Answer: The CAFO effluent guideline is based on a technology design standard that, in effect, prohibits discharges of all pollutants, including phosphorus and phosphorus compounds, from the CAFO production area except during a 24-hour/25-year storm. NPDES permits implement this requirement; therefore, any permit issued to a CAFO pursuant to the 2003 CAFO effluent guideline or pursuant to the previous CAFO regulation would be examples of permits addressing the release of phosphorus or phosphorus compounds from CAFOs.

The 2003 CAFO effluent guideline also required large CAFOs that apply nutrients to their fields to do so in accordance with a nutrient management plan. The effect of this requirement is to regulate the discharge of the pollutants, including phosphorus, that are contained in CAFO wastes.

36. If EPA or an authorized State issued a Clean Water Act permit for a discharge or release of phosphorus or phosphorus compounds from a CAFO, would such a discharge be a "federally permitted release" and thus exempt from liability under CERCLA? If not, please explain why not.

Answer: Whether such a discharge would be a "federally permitted release" and thus exempt from liability under CERCLA would depend upon what section of the Clean Water Act the permit for a discharge or release of phosphorus or phosphorus compounds was issued under. The CERCLA section 101 definition of "federally permitted release" (enclosed) specifically identifies the types of discharges or emissions that are "federally permitted" by statutory authority.

37. Does EPA have information that authorized States are routinely permitting discharges or releases of phosphorus or phosphorous compounds from CAFOs pursuant to the Clean Water Act? If so, please provide such information.

Answer: As stated in response to Q 35, the CAFO effluent guideline is based on a technology design standard that, in effect, prohibits discharges of all pollutants, including phosphorus and phosphorus compounds, from the CAFO production area except during a 24-hour/25-year storm. The 2003 CAFO effluent guideline also required large CAFOs that apply nutrients to their fields to do so in accordance with a nutrient management plan. The effect of this requirement is to regulate the discharge of the pollutants, including phosphorus, that are contained in CAFO wastes.

38. What are the specific types of discharges or releases from CAFOs that are being permitted under the Clean Water Act?

Answer: As stated in response to Q 35, the CAFO effluent guideline is based on a technology design standard. It is estimated that the CAFO regulation will reduce 56 million pounds of phosphorus, 110 million pounds of nitrogen, and 2.1 billion pounds of sediment annually.

39. In January 2003, the Government Accountability Office (GAO) estimated that 4,500 permits had been issued to CAFOs under the Clean Water Act. Based on the latest information available, what is the EPA estimate of the number of CAFOs with Clean Water Act permits?

Answer: To date, approximately 8,140 CAFOs have Clean Water Act permits.

40. Please provide any estimates or other information EPA has with respect to the number of CAFOs in the United States that should have permits under the Clean Water Act.

Answer: EPA has initiated a rulemaking in which we expect to identify the circumstances when CAFOs must apply for NPDES permits. Therefore, we cannot make an estimate at this time.

41. Please identify the enforcement actions the EPA has undertaken in each of the past five fiscal years against CAFOs for violations of the Clean Water Act. Further, please identify the nature of the violation, any disposition or settlement of the case, and the amount of penalties assessed.

Answer: Beginning in FY 2005, EPA formally collected data on enforcement and compliance assurance activities aimed at minimizing the discharge of pollutants into surface waters from concentrated animal feeding operations (CAFOs) for civil violations. The enclosed document, from EPA's Integrated Compliance Information System (ICIS), provides more detailed information on the civil enforcement FY 2005 CAFO case listing. Prior to FY05, EPA gathered information informally and manually relating to enforcement actions for Clean Water Act violations by CAFOs, therefore we do not have a complete listing of enforcement actions specifically against CAFOs for FY2001- FY2004.

42. In January 2003, the GAO estimated that EPA's revised regulations under the Clean Water Act could increase the number of concentrated animal feeding operations that are required to obtain permits to 11,500. At the Subcommittee hearing, Rep. Stupak asked you how many concentrated animal feeding operations are required to have a Clean Water National Pollutant Discharge Elimination System permit and how many have actually been permitted. You promised to answer for the record. Please provide your response to Rep. Stupak's question.

Answer: EPA promulgated regulations in 2003 that required many CAFOs to apply for NPDES permits. When the U.S. Court of Appeals for the Second Circuit vacated and remanded portions of that regulation, EPA initiated a rulemaking to address the issue and is in the process of developing a proposed rule to address the Court's decision. At this time, EPA has not completed its proposal and so is not in a position to estimate how many CAFOs would be required to have an NPDES permit.

43. How many administrative or civil enforcement actions has EPA brought in the last five years against animal feeding operations under the Clean Air Act? Please identify each such enforcement action and the violation alleged.

Answer: EPA has undertaken 2 civil enforcement actions against animal feeding operations for Clean Air Act violations, as described below:

1. Premium Standard Farms: In 1999, EPA intervened in a Clean Water Act citizen suit initiated against PSF and Continental Grain Company. This action later included allegations under the Clean Air Act (CAA), CERCLA, and EPCRA. CAA Section 110 violations alleged included failure to obtain preconstruction and operating permits. In November of 2001, the U.S. EPA and the Justice Department entered into a consent decree with PSF. Settlement of this case included payment of a $350,000 penalty, and monitoring of air emissions of particulate matter, volatile organic compounds, hydrogen sulfide, and ammonia from representative barns and lagoons. If the monitoring levels were found to exceed CAA thresholds for any regulated pollutant, the companies would have been required to apply to the State of Missouri for any necessary Clean Air Act permits. The Consent Decree also required PSF to significantly reduce hydrogen sulfide and ammonia emissions.

2. Buckeye Egg Farms, LLC: In November of 2003, EPA and the Department of Justice filed a judicial complaint against Buckeye Egg Farms citing failure to comply with a Unilateral Order requiring air monitoring testing under the Clean Air Act. In February of 2004, Ohio Fresh Eggs, the new owner of the egg-layer facility in Ohio, agreed to investigate, install, and test a PM control device and implement ammonia reduction technology. The settlement also included payment of an $880,000 penalty. Ohio Fresh Eggs is currently testing potential PM control devices and ammonia reduction technologies.

44. How many animal feeding operations in the United States would be considered large CAFOs (using the EPA Clean Water Act criteria) in each of the following farm industry sectors?

Answer: The following numbers animal feeding operations are approximations:

(a)	Swine (we do not have broken down by weight)	5,533
(b)	Chickens	2,154
(c)	Laying hens or broilers	1,119
(d)	Turkeys	415
(e)	Cattle	2,048
(f)	Dairy	1,639
(g)	Swine (weighing less than 55 pounds)	------

45. If "manure" was legislatively exempted from the definition of "hazardous substance" and "pollutant or contaminant" under CERCLA, would that eliminate Federal liability for any natural resources damages that may result from a large spill?

Answer: Exempting substances from the definition of "hazardous substance" and "pollutant or contaminant" under CERCLA would eliminate liability for natural resource damages under CERCLA.

46. Has EPA ever listed a CAFO on the Superfund National Priorities List? If so, please identify the facility and describe the circumstances of the listing.

Answer: EPA has not listed a CAFO on the Superfund National Priorities List.

47. In your testimony, you state that one of the reasons for conducting the monitoring study is to "allow respondents to determine and comply with their regulatory responsibilities under the CAA . . ." Please describe the responsibilities an animal feeding operation has under the Clean Air Act, excluding obligations relating to diesel generators.

Answer: If an animal feeding operation has emissions of sufficient quantity that meet or exceed the threshold, they may have an obligation to apply for a Title V permit or an NSR/PSD permit.

48. For each of the following air pollutants please list and describe current regulations under the Federal Clean Air Act that limit or control emissions of that pollutant from animal feeding operations, excluding operation of diesel generators.

(a) Ammonia
(b) Hydrogen sulfide
(c) PM2.5
(d) Coarse particles
(e) Volatile organic compounds
(f) Nitrogen oxides

Answer: There are no specific federal regulations under the Clean Air Act that limit or control emissions of Hydrogen sulfide, PM2.5, Coarse particles, Volatile organic compounds, or Nitrogen oxides from these sources. (Ammonia is not a regulated pollutant). However, these pollutants may be regulated by State Implementation Plans.

Dingell/Solis Question 17 (enclosure)

Senate Rep. No. 96-848, to accompany S. 1480, the Environmental Emergency Response Act, by the Committee on Environment and Public Works, 96th Cong., 2d Sess., July 13, 1980

[46]

Fertilizer Exclusion from Definition of Release

Section 2(b)(16) excludes "normal field application of fertilizer" from the definition of the types of releases into the environment otherwise covered by the bill.

Certain feedstocks used to produce fertilizer (nitric acid, sulfuric acid, phosphoric acid, anhydrous ammonia) are hazardous substances as defined by the bill, and certain fertilizer products may be listed as hazardous substances as well. Because such products may be hazardous, their release into the environment would bring the owner or operator of the facility from which the release occurred under the notice and penalty provisions of section 3 and the liability provisions of section 4, and could trigger government response under section 3 and payment of claims under section 6.

Under this exclusion, however, the "normal field application" of fertilizer is not a "release" as defined in the bill. The applicator of the fertilizer is not subject to the notification and liability provisions, and the government does not have authority to respond or pay claims.

The term "fertilizer" includes those products identified in the Standard Industrial Classification Manual (OMB 1972 edition) as SIC Code Nos.: 1474, 1475, 2873, 2873112, 2874, 2874185, 28193, 2810922, and 2819331. The term "normal field application" means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.

* * * * *

Dingell/Solis Question 36 (enclosure)

CERCLA section 101(10) – Federally Permitted Release.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A. § 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of [FN1] section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

RESPONSE TO DECEMBER 2, 2005 QUESTIONS FROM SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS

W.A. Drew Edmondson, Oklahoma Attorney General and Kelly Burch, Chief of Environmental Protection Unit, Oklahoma Attorney General's Office
December 22, 2005

The Honorable Paul E. Gillmor

1. What regulatory or administrative actions have been taken by the Department of Agriculture or other environmental agencies in your state against the poultry growers whose companies are being sued by your office? Were those administrative actions exhausted before you filed your litigation?

Response to Question 1:

Poultry feeding operations have been regulated pursuant to the Oklahoma Registered Poultry Feeding Operations Act, (the "Poultry Act"), 2 O.S. 2001 and Supp. 2005 § 10-9.1 *et seq.*, since 1998. Those operations that qualify as concentrated animal feeding operations have been regulated under the Oklahoma Concentrated Animal Feeding Operations Act, (the "CAFO Act"), 2 O.S. 2001 and Supp. 2005 § 20-1 *et seq.*, since 1997. Since that time, the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") has undertaken a number of regulatory and enforcement actions against registered and licensed operations, including both individuals and companies. For example, from August 1, 2004 to May 1, 2005, ODAFF performed more than forty enforcement actions against violators of poultry statutes and rules. Coordinated Watershed Restoration and Protection Strategy for Oklahoma Impaired Scenic Rivers, p. 11 (Ok. Sec. Env. 2005 Update). Some of these actions were taken against poultry growers affiliated with the Poultry Integrator Defendants that are the subject of the State's lawsuit but not all of the violations were in the Illinois River watershed.

Further, in addition to other federal and state laws, the State of Oklahoma is pursuing the poultry integrators for violations of the Poultry Act and the CAFO Act in this litigation as authorized and contemplated by the statutes. These Acts provide civil enforcement authority to the Attorney General and do not require the State to pursue an administrative enforcement action prior to filing a civil action to address violations. *See* 2 O.S. 2001 and Supp. 2005 §§ 10-9.11(A)(2) and 20-26(E) (Providing that the Attorney General "may bring an action in a court of competent jurisdiction for the prosecution of a violation by any person of a provision" of the Poultry and CAFO Acts). In this instance, the State elected, as is its right, to pursue its civil remedies for violations of these statutes and regulations at the same time it pursues the other causes of action in its lawsuit.

It is also important to note that ODAFF has regulatory jurisdiction over poultry feeding operations only in Oklahoma. Accordingly, ODAFF lacks the ability to initiate administrative action against poultry feeding operations in Arkansas, where the majority of the poultry feeding operations that are causing pollution of the waters of Oklahoma are located. In contrast to ODAFF, however, the Attorney General has a full range of legal rights and remedies available to hold the poultry integrators responsible in a civil action for pollution causing conduct occurring in Arkansas which causes injury and damages in Oklahoma.

2. Under Oklahoma's theory, poultry companies are liable under CERCLA for any animal manure used as a fertilizer that runs off of a farm field as a result of rain, correct? You would consider those poultry companies to be parties that, under CERCLA, "arranged for the disposal" of the manure? Have you done anything to ensure that small family farmers who raise the poultry that generates that manure would be protected from third party contribution suits from the named and other potentially responsible parties in your suit? Can you pick and choose the application of CERCLA in this matter? Won't small family farmers inevitably be drawn into this matter and face liability for CERCLA "response costs" simply for applying manure to their fields?

Response to Question 2:

Oklahoma filed suit against the poultry integrators under CERCLA for the disposal and release or threatened release of hazardous substances contained in poultry waste, such as phosphorus, arsenic, copper, and zinc, into the environment. You are correct that one basis upon which the State asserts the poultry integrators are liable under CERCLA is that they have "arranged for the disposal of their poultry waste." FAC, ¶¶ 74. This Complaint does not name any poultry growers or any other person. The State seeks recovery of its response costs and damages to natural resources caused by the companies' practices from the companies themselves. To the extent that a farmer is applying poultry waste consistent with the fertilizer exception to CERCLA, *see* 42 U.S.C. § 9601(22)(D), such conduct would not give rise to liability under CERCLA. Rather, it is the poultry integrators' widespread practice of over-application and disposal that has resulted in the release of hazardous substances into the environment which is the focus of the State's CERCLA claims. The State has made clear its position that given the relationship between the poultry integrators and the poultry contract growers, it is the poultry integrators who are responsible under CERCLA for the improper handling and disposal of poultry waste generated as a result of this relationship and as described in the Complaint.

3. This question has 2 parts. In December of 2003, the Oklahoma Secretary of the Environment, and directors of the Oklahoma Water Resources Board, the Oklahoma Department of Environmental Quality, and the Oklahoma Scenic Rivers Commission signed a "Statement of Joint Principles and Actions" with two Arkansas environmental agencies, outlining how the two states would work together to improve water quality. Has Oklahoma taken action to implement the "watershed plan" agreed to in December 2003? If in fact OK agreed to the watershed plan, please explain why the state of Oklahoma chose to abandon the agreement in favor of litigation?

Response to Question 3:

The State of Oklahoma has not abandoned any agreement with Arkansas in favor of litigation. In fact, the State is continuing to work with the State of Arkansas to implement the provisions of the Joint Statement of Principles and Actions and recently met with Arkansas and U.S. EPA Region 6 officials to discuss the two states' progress and future plans for the shared Scenic River watersheds. However, it is important to clarify both the genesis of that document and the nature of the agreements.

The Oklahoma Secretary of Environment and the Attorney General negotiated the Joint Statement of Principles and Actions on behalf of Oklahoma's environmental agencies. Negotiations, which began in the Spring of 2002, initially included representatives of five poultry integrators, as well as municipalities and the State of Arkansas. However, the States were only able to resolve the municipal point source phosphorus issues because those cities were willing to implement appropriate phosphorus controls. In contrast, the final document did not set forth agreed phosphorus controls for the poultry integrators because the parties and the poultry integrators could not reach agreement.

Accordingly, the final document does not contain an agreement on the poultry issues and was not intended to relieve or release poultry integrators from taking responsibility for their waste or the pollution caused by its improper management and disposal. Arkansas and the poultry integrators are well aware of this fact and negotiations with the poultry integrators took place for nearly two years after the document was signed in an attempt to resolve the issues without litigation. The success of a watershed plan to be developed by the states pursuant to the Joint Statement of

Principles and Actions will depend on the poultry integrators taking responsibility for safe management of their waste. The State's lawsuit against them is aimed at achieving that goal, and is, therefore, consistent with the commitments contained in the Joint Statement of Principles and Actions.

4. As I understand it, the state of Arkansas has followed through with its commitment to pass regulations for nutrient management, per the 2003 agreement. I further understand the poultry companies have made offers to move excess litter out of certain watersheds in Oklahoma, but those offers have been rejected by your office. How do you respond to this claim?

Response to Question 4:

Assuming this question relates to Arkansas Acts 1059, 1060 and 1061 relating to nutrients and poultry registration, this legislation was enacted by the Arkansas Legislature during the 2003 session. Acts 1059 and 1060 became effective on July 16, 2003 and Act 1061 became effective of January 1, 2004. This legislation was passed prior to the Joint Statement of Principles and Actions which was executed on December 18, 2003. Thus, the legislation, including any corresponding rulemaking requirement, was not enacted as a result of our agreement. The Arkansas Soil and Water Conservation Commission proposed rules to implement the legislation; however, those rules were not approved by the Arkansas Legislature which instead extended the deadline for requiring nutrient management plans at poultry operations until January 1, 2007. Ark. Code Ann. § 15-20-1106. The Arkansas Soil and Water Conservation Commission did adopt emergency rules which became effective on January 29, 2005, but those rules expired on May 31, 2005. It is unclear at this time whether the Arkansas Legislature will extend the effective date even further.

As to the second part of your question, the existence or non-existence of any such offer from the poultry integrators during recent negotiations cannot be disclosed under confidentiality agreements executed to facilitate settlement between the parties. Suffice it to say, however, it has been and remains the State's position that the poultry integrators must assume responsibility for removing and safely managing all of their excess poultry waste generated in these watersheds. Of course, the poultry integrators have the responsibility to safely manage all of their waste and may do so at any time, even in the absence of a settlement agreement with the State of Oklahoma.

5. Congress said that authority over nonpoint source pollution lies within the states. If the State of Arkansas is responsible for nonpoint source pollution in Arkansas, why wasn't your litigation aimed at that State?

Response to Question 5:

It is clear that Congress in the Clean Water Act has left regulation of nonpoint source pollution to the states. In fact, the Clean Water Act does not require that a state enact a regulatory program to control pollution from nonpoint sources. The nonpoint source pollution at issue here is being created by the unlawful conduct of the poultry integrators in Oklahoma and Arkansas. Accordingly, under long-standing legal principles, it is the poultry integrators that are legally liable for the State's injuries and the State of Oklahoma has the right, indeed the duty, to take action against companies that are causing pollution of Oklahoma's natural resources. The lawsuit filed against the poultry integrators is not a dispute with the State of Arkansas.

6. You mention that it is unprecedented for an industry to get a waiver from CERCLA, yet petroleum, a major OK industry, is exempted. What evidence is there that the tourism and recreation industry is being damaged by petroleum pollution in Oklahoma lakes and rivers? Have any rivers or beaches been closed to human activities because of pollution from nonpoint source runoff? If there has been no evidence, what evidence is there that the tourism and recreation industry is being damaged by pollution from manure and animal agriculture in Oklahoma lakes and rivers?

CERCLA does contain a limited exemption for petroleum to the extent that "it is not otherwise specifically listed or designated as a hazardous substance . . .." See 42 U.S.C. § 9601(14); *See also, e.g.,* 33 U.S.C. § 2701(23). There are, however, other regulatory schemes addressing the environmental problems caused by releases of petroleum. For example, the Oil Pollution Act of 1990 established a federal comprehensive scheme relating to spills, cleanup, liability, and compensation for the discharge or threatened discharge of petroleum into navigable waters. *See* 33 U.S.C. § 2701 *et seq.* Under OPA, similar to CERCLA, the United States, States, and Indian Tribes can recover removal costs and natural resource damages from persons responsible for oil discharges, including petroleum. *See* 33 U.S.C. §2702. Thus, to the extent that petroleum is exempted from CERCLA, the State can recover removal costs and natural resources damages for discharges to navigable waters under OPA. Historically, there have been a number of pollution incidents caused by the discharge of petroleum to waters in Oklahoma. *See, e.g.*; U.S. v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. Okla. 1979) and U.S. v. Koch Industries, Inc. et al., Civil Action No. 97 CV687 B(E) (N.D.Okla.)(Consent Decree 2000) (Resolving numerous violations in three states at 300 sites, including 221,000 gallons that were released resulting in an oil spill that traveled 25 miles to Keystone Lake, a popular recreational facility).

To my knowledge, there have not been any river or beach closures in Oklahoma related to nonpoint source pollution. Of course, the existence of river and/or beach closures is not the appropriate criteria for judging whether pollution from nonpoint sources is causing a violation of water quality standards or damaging the natural resources of the State. A summary of the pollution in the Illinois River Watershed caused by poultry waste is set forth in our Written Statement on pages 15 and 16. Evidence regarding the impact of this pollution will be presented at trial. Furthermore, it is important to note that pollution caused by contaminants such as metals, phosphorus, nitrogen, and bacteria can impact not only the tourism industry, but also human health, public water supplies, fish, wildlife, recreation, aesthetics, and the value and safety of water for future use.

7. Do you recognize that poultry litter is an asset that belongs to the poultry growers, not the poultry companies? It is my understanding that contracts, between the smaller poultry growers and the larger poultry processing companies, state that the grower owns the litter. How do you respond to those who would argue that the state, acting as an Natural Resource Damage trustee, is interfering with private contracts by trying to make the companies responsible for an asset that doesn't belong to them?

Response to Question 7:

In this litigation, the State of Oklahoma is concerned with the improper handling and disposal of poultry waste generated by industrial scale poultry operations. For example, nationally as of 1997, the poultry industry was estimated to produce over 8,000,000 tons of poultry waste each year. Goodwin, H.L, *et al.*, Off-farm Litter Management and Third-Party Enterprises, App. 3 (January 2000)[1]. In Northwest Arkansas alone, as of 2000, it was estimated that over "one million tons" of poultry waste was generated at more than one thousand poultry operations each year. Id. at Section 1.1, ¶ 2. According to the University of Arkansas Cooperative Extension Service, "[i]f improperly managed, poultry manure can become a liability rather than an asset by causing problems in the environment and creating hazards to human and animal health." Boles, Jack C., Jr. *et al.*, Environmental Concerns Dry Poultry Manure Management – MP 358, University of Arkansas – Division of Agriculture Cooperative Extension Service

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[1] http://www.winrock.org/where/Off-Farm%20Litter%20Management%20report.pdf

(2004)[2]. In this regard, the poultry integrator companies which own the birds, attempt to "place the environmental liability squarely on the shoulders of the grower" through various strategies. *See* Off-farm Litter Management, *supra.* at Section 1, ¶ 1. In reality and as a matter of law, the poultry growers are merely the employees and/or agents of the poultry integrators. Thus, the State cannot agree with those who contend that its lawsuit is interfering with private contracts; rather, its lawsuit is an effort to affix liability on the liable parties: the poultry integrators.

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[2] http://www.uaex.edu/Other_Areas/publications/HTML/MP358/default.asp

The Honorable John Sullivan

1. In your testimony you mention that the State of Oklahoma spent years of unsuccessful negotiations with the poultry industry regarding poultry waste clean-up issues. Can you provide detail on those negotiations and the EPA's role in them?

Response to Question 1:

The State of Oklahoma first met with the poultry industry in November of 2001 to discuss the pollution in Eastern Oklahoma caused by its poultry operations. At that time, the City of Tulsa was preparing for litigation against the poultry industry for pollution of the Eucha-Spavinaw watershed which serves as Tulsa's drinking water supply. The City of Tulsa filed its lawsuit in December of 2001. Negotiations between the State and most of the poultry integrators doing business in the Illinois River Watershed continued until August of 2005. During that time, the State of Arkansas and Region 6 of the U.S. Environmental Protection Agency have participated in various ways.

During 2002, the State of Oklahoma undertook negotiations with certain poultry integrators and municipalities in the Illinois River Watershed in conjunction with the State of Arkansas. After a meeting between Arkansas and Oklahoma officials in June of 2002, the Attorney General announced that he would defer the filing of litigation against the poultry industry so long as progress was being made in these negotiations. In July of 2002, numerous State officials, municipal officials, poultry industry representatives, and state university personnel met in Fayetteville, Arkansas to attempt to arrive at a mutually agreeable solution to the pollution problems in the Illinois River watershed. With regard to the poultry industry, the parties were unable to reach resolution on the proper approach to phosphorus management. In October of 2002, Oklahoma sent a settlement proposal to Arkansas, the municipalities and the poultry integrators and, over the next two months, the parties exchanged counteroffers. In December of 2002, the State of Oklahoma met with representatives of Region 6 of the U.S. Environmental Protection Agency in Dallas, Texas who indicated that they wanted to assist the States in resolving the problem, but that they had limited ability to assist us with regard to the unregulated, nonpoint source poultry pollution in the Illinois River Watershed.

In February of 2003, the Arkansas and Oklahoma Attorneys General convened a meeting with the poultry integrators at the Oklahoma State Capitol to again discuss resolution of this matter without litigation. In March of 2003, Arkansas and Oklahoma officials attended a meeting at the U.S. EPA Region 6 Office in Dallas, Texas to continue negotiations with the assistance of the EPA. The States and EPA continued their negotiations and, based on the commitments of the municipalities, an agreement was reached in December of 2003 to address municipal point source contributions in the State's Scenic River Watersheds. Discussions with the poultry integrators were ongoing during this time, but no resolution was reached.

In May of 2004, the State again resumed negotiations with the poultry integrators and, in July of 2004, the State received a settlement proposal. In August of 2004, the State reiterated its settlement terms and, in September of 2004, the industry submitted its offer again and took out newspaper advertisements outlining a proposal to the citizens of Oklahoma. Further negotiations took place during the Fall and, in December of 2004, the parties met to resume face to face negotiations. The Attorney General then decided to pursue formal mediation with the poultry integrators prior to filing the lawsuit. In the Spring of 2005, the parties retained former United States Federal District Court Judge Thomas Brett to serve as a mediator and he was assisted by Gregg Cooke, former U.S.

EPA Region 6 Administrator. The parties participated in the mediation process without resolution. Litigation was filed on June 13, 2005 and service was withheld until August of 2005 in order to complete the mediation process in the hope that litigation would not be necessary.

Most of the detailed settlement negotiations with the poultry industry were undertaken pursuant to confidentiality agreements to facilitate free and open communication between the parties. However, we can say that from the beginning, Oklahoma was seeking a commitment from the poultry integrators to accept responsibility for safe management and disposal of poultry waste generated at their operations.

2. In 2003, the States of Oklahoma and Arkansas, through state environmental representatives, agreed to a statement of joint principles and actions addressing excess poultry waste between the two states. What caused this agreement to fail? Did representatives from both states walk away from this agreement? Was there any attempt at mediation by the two parties before Oklahoma State Attorney General Drew Edmondson filed his federal lawsuit against the poultry industry? Can you detail all attempts at negotiation?

Response to Question 2:

The Joint Statement of Principles and Actions is a non-binding agreement between the environmental agencies in Arkansas and Oklahoma which outlines certain principles and actions intended to aid in reducing phosphorus pollution in shared Scenic River watersheds. This document was negotiated by the Oklahoma Secretary of Environment and Attorney General for the State of Oklahoma and was signed by the state agencies in December of 2003. This agreement has not failed and the states continue to work cooperatively to achieve its goals.

It is important to understand that the Joint Statement of Principles and Actions does not and was not intended to resolve the State of Oklahoma's claims against the poultry industry or to relieve the poultry industry of its responsibilities for implementing appropriate pollution controls in the Scenic River watersheds. Although the parties attempted to resolve the problems caused by the poultry industry in these watersheds, the final agreement did not set forth agreed phosphorus controls for the poultry integrators because the parties and the poultry integrators involved in the negotiations were not able to agree on a resolution. As a result, Oklahoma's negotiations with the industry continued after the agreement was finalized in an attempt to avoid litigation.

3. In their testimony, the Oklahoma Farm Bureau stated that the poultry industry has offered to move excess poultry waste out of certain watersheds in Oklahoma, but that those offers were rejected by the State of Oklahoma. Is this true?

The existence or non-existence of any such offer from the poultry integrators during recent negotiations cannot be disclosed under confidentiality agreements executed to facilitate settlement between the parties. Suffice it to say, however, it has been and remains the State's position that the poultry integrators must assume responsibility for removing and safely managing all of their excess poultry waste generated in these watersheds. Of course, the poultry integrators have the responsibility to safely manage all of their waste and may do so at any time, even in the absence of a settlement agreement with the State of Oklahoma.

If the Oklahoma Farm Bureau is referring to the industry statements in the advertisements published in September of 2004, the industry did not state that it was offering to move "all excess poultry waste" out of the affected watersheds. In fact, that advertisement only contained a proposal to reduce the amount of litter land applied in

Scenic River watersheds by approximately 200,000 tons during an interim, three year period. Without even considering the volumes of poultry waste generated in Oklahoma, researchers have estimated that more than one million tons of poultry waste is generated in Northwest Arkansas alone. Off-farm Litter Management and Third-Party Enterprises, *supra* at Section 1.1, ¶ 2. The University of Arkansas Extension Service reported that it has been estimated that alternative uses must be found for as much as half of the litter generated in concentrated production areas in Arkansas. Nutrient Analysis of Poultry Litter and Possible Disposal Alternatives, Avian Advice, University of Arkansas, Fall 2003, Vol. 5, No. 3, p. 4. In sum, the offer contained in the advertisement was unenforceable, inadequate and would likely have placed the burden of waste handling and disposal on the poultry growers.

The Honorable Charles F. Bass

1. I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?

Response to Question 1:

The Oklahoma Attorney General is not currently involved with Clean Air Act issues relating to livestock operations and will defer to EPA on those issues. Oklahoma is dealing with the effects of the poultry industry on waters of the State and we can speak to those issues. The Clean Water Act does not regulate nonpoint source pollution and, as detailed in our Written Response on page 5, the majority of animal feeding operations are not currently regulated under the Clean Water Act. However, even if those facilities were regulated, CERCLA should apply to releases of hazardous substances from these facilities as it does to other regulated industries. The poultry industry in Arkansas and Oklahoma is releasing hazardous substances, such as phosphorus, arsenic, zinc and copper, into some of our most important and protected watersheds. Releases of hazardous substances are causing or threatening significant harm to Oklahoma's natural resources.

2. The funding levels for the Environmental Quality Incentives Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79million in EQIP funds but already has a backlog of $1.41million in requests for projects it can't fund. With the uncertainty of agriculture programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my question is without a substantial increase in this program will producers be able to get their operations in compliance?

Response to Question 2:

Federal programs such as EQIP can be part of the solution, but the entities causing pollution must be held responsible for solving the problems they have created. With regard to the poultry industry, the State of Oklahoma takes the position that the poultry integrators, as opposed to their contract growers or Oklahoma citizens, can and should bear the financial burden of properly managing the waste generated by their operations.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. Without violating any confidentiality agreements, please describe the efforts, if any, the State of Oklahoma has undertaken to resolve its concerns through mediation, direct communication with the poultry operations, or other actions short of filing its lawsuit.

Response to Question 1:

The State of Oklahoma first met with the poultry industry in November of 2001 to discuss the pollution in Eastern Oklahoma caused by its poultry operations. At that time, the City of Tulsa was preparing for litigation against the poultry industry for pollution of the Eucha-Spavinaw watershed which serves as Tulsa's drinking water supply. The City of Tulsa filed its lawsuit in December of 2001. From the beginning, Oklahoma was seeking a commitment from the poultry integrators to accept responsibility for safe management of excess poultry waste generated at their operations.

During 2002, the State of Oklahoma undertook negotiations with certain poultry integrators and municipalities in the Illinois River Watershed in conjunction with the State of Arkansas. After a meeting between Arkansas and Oklahoma officials in June of 2002, the Attorney General announced that he would defer the filing of litigation against the poultry industry so long as progress was being made in these negotiations. In July of 2002, numerous State officials, municipal officials, poultry industry representatives, and state university personnel met in Fayetteville, Arkansas to attempt to arrive at a mutually agreeable solution to the pollution problems in the Illinois River watershed. With regard to the poultry industry, the parties were unable to reach resolution on the proper approach to phosphorus management. In October of 2002, Oklahoma sent a settlement proposal to Arkansas, the municipalities and the poultry integrators and, over the next two months, the parties exchanged counteroffers. In December of 2002, the State of Oklahoma met with representatives of Region 6 of the U.S. Environmental Protection Agency in Dallas, Texas who indicated that they wanted to assist the States in resolving the problem, but that they had limited ability to assist us with regard to the unregulated, nonpoint source poultry pollution in the Illinois River Watershed.

In February of 2003, the Arkansas and Oklahoma Attorneys General convened a meeting with the poultry integrators at the Oklahoma State Capitol to again discuss resolution of this matter without litigation. In March of 2003, Arkansas and Oklahoma officials attended a meeting at the U.S. EPA Region 6 Office in Dallas, Texas to continue negotiations with the assistance of the EPA. The States and EPA continued their negotiations and, based on the commitments of the municipalities, an agreement was reached in December of 2003 to address municipal point source contributions in the State's Scenic River Watersheds. Discussions with the poultry integrators were ongoing during this time, but no resolution was reached.

In May of 2004, the State again resumed negotiations with the poultry integrators and, in July of 2004, the State received a settlement proposal. In August of 2004, the State reiterated its settlement terms and, in September of 2004, the industry submitted its offer again and took out newspaper advertisements outlining a proposal to the citizens of Oklahoma. Further negotiations took place during the Fall and, in December of 2004, the parties met to resume face to face negotiations. The Attorney General then decided to pursue formal mediation with the poultry integrators prior to filing the lawsuit. In the Spring of 2005, the parties retained former United States Federal District Court Judge Thomas Brett to serve as a mediator and he was assisted by Gregg Cooke, former U.S. EPA Region 6 Administrator. The parties participated in the mediation process without resolution. Litigation was filed on June 13, 2005 and service was withheld until August of 2005 in order to complete the mediation process in the hopes that litigation would not be necessary.

2. In your prepared testimony, you stated that the majority of animal feeding operations are not subject to the permitting requirements of the Clean Water Act, and thus are not adequately addressed by other Federal laws.
3. Please describe the basis of your testimony concerning the inadequacy of regulation under the Clean Water Act for animal feeding operations.

Response to Questions 2 and 3:

This testimony was addressed to the assertion that poultry feeding operations are thoroughly regulated under the Clean Water Act. Exhibit 4 to our Written Statement shows the location of poultry feeding operations in the Eastern Oklahoma watersheds of concern. It also shows the small number of those poultry operations that have been permitted as CAFOs under the Clean Water Act. Thus, most of the poultry operations causing pollution of the Illinois River Watershed and other impacted watersheds in Oklahoma are not regulated under the Clean Water Act. Although it is clear that there are a large number of birds at poultry feeding operations which are highly concentrated in most of these watersheds, because the permitting system is based on an extremely high bird population, most individual facilities do not qualify as CAFOs.

As described on page 5 of our Written Statement, most animal feeding operations across the country are not currently regulated under the Clean Water Act and the CAFO regulations focus primarily on nutrients, as opposed to metals and pathogens. The August 22, 2002 comments of the U.S. Poultry and Egg Association, the National Chicken Council and the National Turkey Federation on EPA's CAFO rulemaking further illustrate the problem. Letter from John E. Starkey, P.E., Vice President of

Environmental Programs, U.S. Poultry & Egg Association to Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency (August 22, 2002)[3]. These groups argued against the EPA's proposed rule and the proposal to begin regulating what they call "dry litter" poultry operations which housed more than 125,000 broilers or 82,000 laying hens as CAFOs. Id. at 1. The majority of the poultry operations in the Illinois River Watershed and other affected watersheds in Eastern Oklahoma are "dry litter" operations.

In so arguing, they presented information demonstrating that, if the EPA proposed threshold was implemented, only ten percent or 2,900 poultry operations would be regulated. Id. at 3. Even if the threshold were reduced to 50,000 broilers, according to this group, only fifty-three percent or 15,370 poultry operations would be regulated. Id. These numbers were based on a joint survey conducted by these industry groups. Id. EPA eventually selected the 125,000 broilers and 82,000 laying hen thresholds as the regulatory thresholds for permitting as a large CAFO. *See* 40 C.F.R. §122.23(b)(4). Medium CAFOs, those with 37,500 to 124,999 broilers or 25,000 to 81,999 laying hens are only required to be permitted if pollutants are conveyed to waters of the United States through a man-made device or if pollutants are discharged directly to waters that originate outside the facility pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation. *See* 40 C.F.R. §122.23(b)(6). Contrary to the industry group's representations, EPA estimated that a total of 2,152 poultry operations would be regulated as either Medium or Large CAFOS. U.S.EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding

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[3] http://www.poultryegg.org/Environment/docs/FinalCAFO.pdf.

Operations (CAFOs); Final Rule, 68 Fed. Reg. 7176, 7243, Table 8.1 (February 12, 2003). The EPA further estimated that the new rule would only reduce pollutant loading from Large CAFOs from 658 million pounds to 503 million pounds of nutrients, 20 million pounds to 19 million pounds of metals, and 5,784 10^{19} cfu to 3,129 10^{19} cfu of pathogens. Id. at 7239, Table 7.2. Similar results were predicted for Medium CAFOs. Id. Thus, only a small percentage of poultry feeding operations are regulated under the Clean Water Act and pollution from those animal feeding operations that are regulated as CAFOs will still be significant.

Additionally, even those few facilities that are required to be permitted are not likely to actually be regulated for some time because the U.S. EPA is currently proposing to extend the deadline for newly defined CAFOs to apply for permits and obtain nutrient management plans until March 30, 2007 as a result of a Second Circuit Court of Appeals decision in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005). U.S. EPA, Revised Compliance Dates for National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 70 Fed. Reg. 75,771 (December 21, 2005). The Second Circuit decision further limited the effectiveness of these regulations by holding that the EPA lacked the statutory authority to require CAFOs to apply for a permit. In so holding the Court noted that "We hasten to note, however, that if Congress were to amend the Clean Water Act to permit the imposition of a duty-to-apply, we believe the EPA would have ample reason to consider imposing this duty upon Large CAFOs. In our view, the EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process." Id. at 506, fn. 22.

January 18, 2005

Honorable Paul E. Gillmor, Chairman
House Subcommittee on Environment and Hazardous Materials
1203 Longworth House Building
Washington, D.C. 20515

Re: Updated and Additional Information on Arkansas' Nutrient Management Regulations

Dear Chairman Gillmor:

As you may recall, in response to your written question number four, we explained our view regarding the relationship between the "Statement of Joint Principles and Actions" and the nutrient management rulemaking requirements applicable to the Arkansas Natural Resources Commission ("ANRC")[1] under Arkansas Acts 1059, 1060 and 1061 of 2003. We also provided some basic information on the history of the ANRC's rulemaking efforts. The purpose of this letter is to inform the Subcommittee that the ANRC appears to have recently enacted rules to replace the emergency rules referenced in our written response. While we do not believe that this development should have any effect on the substantive issues pending before the Subcommittee, we want to provide this update and additional information to ensure the record is complete.

Based on publicly available documents obtained from the ANRC and Arkansas Secretary of State, it appears that the ANRC has recently promulgated rules to implement Arkansas Acts 1059, 1060 and 1061, as amended.[2] These rules appear to replace the emergency rules that became effective on January 29, 2005, and expired on May 31, 2005. Although the record is not clear, these emergency rules seem to have gone into effect after a legislative committee referred the ANRC's first proposed rules to the Arkansas Legislative Council on December 16, 2004. See Ark. Sec. State Notice 138.00.04-001N through 006N; Wesley Brown, Angry Farmers Tell Lawmakers to Toss Chicken Litter Law, Arkansas News Bureau, December 17, 2004. Subsequently, the Arkansas Legislature appears to have amended the statutes to provide, among other things, that nutrient or poultry litter management plans for the application of poultry litter would not be required within a nutrient surplus area until after January 1, 2007. See Ark. Code Ann. § 15-20-1106(f); 2005 Ark. Laws Act 2294 (April 14, 2005).

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[1] The Arkansas Natural Resources Commission was formerly known as the Arkansas Soil and Water Conservation Commission.

[2] The ANRC appears to have promulgated permanent rules governing Poultry Feeding Operation Registration, Title 19; Nutrient Management Planner Certification, Title 20; Nutrient Management Applicator Certification, Title 21; and Soil Nutrient and Poultry Litter Application and Management, Title 22. See http://www.aswcc.arkansas.gov/CommissionRules.htm; Ark. Sec. State Notice 138.00.05-001N; http://www.sos.arkansas.gov/elections/elections_pdfs/register/aug_05/0805.pdf.

According to Section 2201.1 of the Arkansas Code of Rules, the ANRC's new regulations governing soil nutrient and poultry litter application in Title 22 went into effect on January 1, 2006. However, like the statute, the regulations do not appear to require either a nutrient or poultry litter management plan for the application of nutrients from poultry litter within "Nutrient Surplus Area" until after January 1, 2007. See Code Ark. R. Title XXII, Section 2202.3(A)(1). The regulations also establish what the ANRC has referred to as a "protective rate" for nutrient application. See Code Ark. R. Title XXII, Section 2202.5. From an initial review of the regulations in Title 22, it appears that the "protective rate" allows application of poultry waste up to 1.5 tons per acre without a soil test. With a soil test, it appears that the "protective rate" may allow poultry waste to be applied in excess of any legitimate phosphorus agronomic need on soils with high soil test phosphorus concentrations. See e.g., Title XXII, Section 2202.5(B); Appendix B, Table 1 (for example, Table 1 appears to allow application of 1.5 tons per acre of poultry waste to fields with a soil test phosphorus of 1000-1100 lbs per acre under normal conditions).

Further, the regulations provide that the ANRC "may, in its discretion, defer mandatory compliance with portions of the program related to regulation of Nutrient Application, Nutrient Management Plans, and Poultry Litter Management Plans, for up to two (2) years if the Commission deems it necessary to allow development of Nutrient Management Plans and Poultry Litter Management Plans." See Title XXII, Section 2201.3(D). The statutes also appear to provide that the ANRC may further defer the requirements of Arkansas Code Annotated Sections 15-20-1106 through 15-20-1108 relating to Nutrient Application, Nutrient Management Plans or Poultry Litter Management Plans "if it determines that there is no alternative use for litter or there are no readily available, affordable alternative nutrient supplies for which litter has been used." Ark. Code Ann. § 15-20-1111 (c)(2).

Thank you for the opportunity to provide you with information on this important matter. If we can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Kelly Hunter Burch
Assistant Attorney General

cc: The Honorable Hilda L. Solis, Ranking Member,
Subcommittee on Environment and Hazardous Materials

Robert T. Connery
Phone (303) 295-8133
rconnery@hollandhart.com

December 16, 2005

The Honorable Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials
of the Committee on Energy and Commerce
2323 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515-6115

Dear Chairman Gillmor:

I greatly appreciate the thoughtful questions and concerns raised by you and Representatives Wilson, Bass, Dingell and Solis in your letter dated December 2, 2005. Working with the National Cattlemen's Beef Association ("NCBA"), and its Director for Environmental Issues, Tamara McCann Thies, I have endeavored to respond to those questions as fully as possible in the time allotted. Our answers to these questions, on behalf of NCBA, are attached.

Based on the work we have been able to do to date, I firmly believe that Congress did not intend to cover naturally-occurring, biologic materials, such as manure from cattle operations that is recycled as fertilizer, as a CERCLA "hazardous substance." Nonetheless, given this litigious and contentious time, it is very important that Congress address the issue and clarify it to remove the cloud that currently exists over animal agriculture in this country.

Your attention to this issue, and that of the Subcommittee, are greatly appreciated by the National Cattlemen's Beef Association. If we can be of any further assistance, please let us know.

Very truly yours,

Robert T. Connery
of Holland & Hart LLP

RTC:jj

cc: The Honorable Hilda L. Solis, Ranking Member
Peter Kielty
Tamara McCann Thies

Answers to Questions Submitted to
the National Cattlemen's Beef Association
by Honorable Paul E. Gillmor

Question 1. Mr. Connery, you said that you believed that Congress did not intend to regulate manure as a Superfund hazardous substance. What is your basis for that view?

Answer 1. The basis for that belief is an exhaustive review of the Superfund laws in connection with our determination of whether the emergency release reporting provisions of CERCLA applied to cattle operations. The inquiry started with the words of CERCLA itself, which applied these requirements to the "release" of "hazardous substances" from "facilities" into the "environment." In applying these terms to the natural and biological processes by which manure from cattle is deposited in the fields and pens of cattle operations, and recycled onto croplands and composted as fertilizer, we found that the terms used did not clearly or comfortably fit cattle operations. In such cases, the courts go the purposes of the statute to guide its interpretation. As one eminent court noted, "Attention must always be given to what Congress sought to accomplish by the statute. . . 'There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of oversolicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it" (quoting *Federal Deposit Insurance Corporation v. Tremaine,* 133 F.2d 827, 830 (2d Cir. 1943), *Billik v. Berkshire,* 154 F.2d 493, 494 (2d Cir. 1946). Surely one winces at concluding that cattle defecating are facilities releasing hazardous substances into the environment, or that those words match or "fit" what Congress intended.

Our comprehensive review of the legislative history of what Congress intended to cover under the CERCLA laws found a litany of references to "synthetic," "man-made" chemicals, "chemical contamination," and the results of "modern chemical technology" as the problems CERCLA intended to address. S. Rep. No. 96-848 at 2-6, 12 (1980); S.Rep. No. 99-11 at 1-2 (1985); S. Rep. No. 99-73, at 12 (1985); H.R. Rep. No. 99-253, part 5, at 2 (1985). It contained no reference to an intention to clean up manure or urea, or their byproducts, from cattle or any other animal agricultural operations.

At the same time, whenever the legislative history did refer to livestock or agriculture, it did so in the context of protecting those activities from the hazards it was addressing. For instance, the Senate committee stated that the legislation was intended to cover "spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health" S. Rep. No. 96-848, at 5 (1980) and commented that such releases have resulted in the "loss of livestock and food products to contaminated drinking water and feed . . ." *Id.* It also noted that Superfund "may be used to compensate an agricultural producer . . . for loss" resulting from such releases of hazardous substances" *id.* at 78, and that such losses included injury to "livestock" *id.* at 79. Livestock operations were viewed as needing protection, not as a source against which others might need protection.

Another indication that Congress did not intend to cover the natural generation of substances like ammonia from the bacterial decomposition of nitrogen in soils and manure was found in the taxation provisions of CERCLA. Those provisions state that substances like ammonia, when used for agricultural purposes, are not covered by the taxation provisions of CERCLA. Specifically, "nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, ... [or] when used as a nutrient in animal feed," are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); *see also* S. Rep. No. 99-73, at 9 (1985).

It would be anomalous not to tax ammonia used in agriculture if Congress intended to require its cleanup from those operations. The exemption is based largely on the premise that "taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which appears to be unnecessary." *Id.* Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would constitute an "unnecessary burden" on Cattle Operations.

From these indications, we concluded that the Superfund laws for release reporting were not intended to cover the biological and natural processes producing manure at cattle operations, and indeed were intended to protect such activities from man-made, synthetic, manufactured chemicals produced by modern technology. This conclusion was fortified by a consideration of Congress's exclusion of "naturally-occurring substances" from CERCLA "response" or cleanup authority. Congress, recognizing that "CERCLA response authorities are extremely broad . . ." excluded from the scope of the federal response authority the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 104(a)(3)(A); *and see also* S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA's response authority, noting that naturally occurring releases, such as "diseases or contamination resulting from animal waste (e.g. beaver excrement)," are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena were, we believe, intended by Congress to be excluded from EPA's response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA's response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely "where it is naturally found," i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The "normal application of fertilizer" is separately excluded from the definition of CERCLA "releases". 42 U.S.C.A. § 101 (22).

Some might argue that livestock are not "naturally" contained within fenced pens or in the large numbers involved in modern Cattle Operations. However, this ignores that the CERCLA exemption is directed at whether the *substance* is naturally-occurring, not at the context or circumstances in which the substance might be released.

For reasons that apply with equal force to livestock operations, EPA has exempted from release reporting under CERCLA several substances that are not considered to present risks that warrant regulation under CERCLA. The agency has found reporting of such releases not to be consistent with the purposes of CERCLA release reporting:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require 'notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.' [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist."

54 Fed. Reg. 22524, 22528.

Based on this interpretation, EPA exempted release of "naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction." *Id.*

With respect to disturbance of large areas of land, such as farming that caused releases of "reportable quantities" of radionuclides, EPA concluded that those "activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted "the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers." *Id.* EPA explained that it did so because "the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement." *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

> "will always be emitted continuously at low levels spread over large areas" [and] "never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released."

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance "to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2.

On balance, and read fairly in accordance with their purpose, we believe that the Superfund laws were not intended to cover manure from cattle operations or other animal agriculture. One winces at the strained and distorted interpretations that would reach the conclusion that they are covered. At the same time, Congress stated that it intended to protect livestock and agriculture from the hazards it intended to address under the Superfund laws, and excluded a category of "naturally-occurring substances" we believe covers animal waste.

Question 2. Your written testimony states that reporting requirements, like the congressional decision not to levy Superfund taxes on livestock producers, should be avoided in order to keep a serious regulatory burden from being placed on these growers. Could you please explain how reporting under CERCLA section 103 or EPCRA section 124 would be an unnecessary burden for these producers?

Answer 2. The emergency release reporting requirements of section 103 require exceptional diligence, and impose heavy burdens and risks on those subject to them. They require immediate reporting of releases of reportable quantities of hazardous substances, subject to criminal penalties for failure to do so. They are intended to notify emergency response authorities, so that those authorities may respond and deal with the emergency.

In the case of ammonia from bacterial decomposition of manure at open air cattle operations, this requirement would needlessly require immediate notification by hundreds, if not thousands, of operations for insignificant amounts of ammonia. The National Response Center would be inundated with notice from cattle pasturing and feeding operations, dairy operations, and numerous other animal agriculture operations. It is inconceivable that those notifications would ever lead to any response action, since there is no evidence of the need to do so. The "releases" are low level; they pose no threat to public health or the environment, and it would be an utter waste of public resources for authorities to investigate and to consider remedial action when it would never lead to any such action.

Some have suggested that these releases could be dealt with by the annual "continuous release" exemption filing. It is not at all clear that that "exemption" would apply. Even if applicable, it is onerous indeed, requiring annual reassessment and characterization of the release. In the case of the fugitive emissions of ammonia from manure in open pastures and feedlots, such studies would be very costly, and the results highly uncertain and unreliable. The following are the requirements for continuous release reporting eligibility and compliance:

A continuous release is "a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes." 40 C.F.R. § 302.8(b). The release must also be "stable in quantity and rate," which means that it is "predictable and regular in the amount and rate of emission." *Id.* A facility, including adjacent or contiguous facilities that are aggregated for the purpose of release reporting, will be deemed to have one continuous release, even if that release is made up of a number of different hazardous substances from a number of sources. *See* U.S. Environmental Protection Agency, *Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance* 7 (1997), *at* http://www.epa.gov/superfund/resources/release/part1-fa.pdf. "A continuous release may be a release that occurs 24 hours a day (e.g. , a radon release from a stockpile) or a release that occurs during a certain process (e.g., benzene released during the production of polymers) or a release that occurs intermittently (e.g., the release of a hazardous substance from a tank vent each time the tank is filled)." *Id.* at 3. If a release qualifies as continuous, the facility can choose to report under the reduced continuous reporting requirements under both CERCLA and EPCRA. *See* 40 C.F.R. §§ 302.8, 355.40(a)(2)(iii).

Individual facilities have discretion in determining whether their releases qualify as continuous. The person in charge of a facility can rely on "release data, engineering estimates, knowledge of operating procedures, or best professional judgment to establish the continuity and stability of the release." 40 C.F.R. § 302.8(d)(1)-(2). Historical reporting of releases to the NRC can also be used to establish continuity. *See id.* "**Monitoring data are not required**. Regardless of which method is used, however, **all estimates reported for a particular release must have a sound technical basis.**" U.S. Environmental Protection Agency, *Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance* 5 (1997), *at* http://www.epa.gov/superfund/resources/release/part1-fa.pdf. (Emphasis added.) Further, the EPA may question the basis for the determination, and it is important for a facility to fully document its determination that a release is continuous. *See* U.S. Environmental Protection Agency, *Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance* 10 (1997), *at* http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

Once the person in charge of a facility determines that the release from the facility would qualify as "continuous," a three-step reporting procedure is triggered. First, the person in charge must notify the NRC, SERC, and LEPC by telephone to alert these authorities of the facility's intent to report the release as continuous. *See* 40 C.F.R. § 302.8(d)(3); U.S. Environmental Protection Agency, *Superfund Continuous Release Reporting Process*, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm.

Then, within 30 days of the initial telephone notification, the person in charge must submit written notification of the continuous release to the NRC, SERC, and LEPC. *See* 40 C.F.R. § 302.8(e)(i); U.S. Environmental Protection Agency, *Superfund Continuous Release Reporting Process*, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm. The written report must contain a detailed description of the facility, surrounding area, and each hazardous substance to be released, including the source of the release, past release information, and the frequency of the release. *See* 40 C.F.R. § 302.8(e)(1). The written report must also include a "brief statement describing the basis for stating that the release is continuous and stable in quantity and rate." *Id.* § 302.8(e)(1)(iv)(E). All reported information must be "accurate and current to the best knowledge of the person in charge." *Id.* § 302.8(e)(1)(iv)(H). The purpose of the written report is to confirm the facility's intent to report the release as continuous and give the EPA sufficient information about the release to enable it to determine if the release qualifies as a continuous release. *See* U.S. Environmental Protection Agency, *Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance* 7 (1997), *at* http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

Finally, "within 30 days of the first anniversary of the initial written notification, the person in charge of the facility or vessel shall evaluate each hazardous substance release reported to verify and update the information submitted in the initial written notification." *Id.* § 302.8(f). This written report must contain substantially the same information as the initial report, "but should be based on release data and information gathered over the previous year since the submission of the initial written report. The continuous release must be reassessed annually to determine whether information previously submitted has changed." U.S. Environmental Protection Agency, *Superfund Continuous Release Reporting Process*, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm. After submittal of the one-year anniversary report, the EPA requires the facility to perform an annual internal reassessment of its release, but the facility need not submit a written report "unless there is a change in the information previously submitted to EPA." U.S. Environmental Protection Agency, *Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance* 8 (1997), *at* http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

The occurrence of two additional circumstances will also trigger further reporting requirements: 1) a statistically significant increase in the release; or 2) a change in previously submitted release information. A statistically significant increase is "an increase in the quantity of the hazardous substance released above the upper bound of the reported normal range of the release." 40 C.F.R. § 302.8(b). The normal range, in turn, is "all releases. . . of a hazardous substance reported or occurring over any 24-hour period under normal operating conditions during the preceding year. Only releases that are both continuous and stable in quantity and rate by may be included in the normal range." *Id.* Thus, if a release exceeds the normal range within any 24-hour period, the person in charge must notify the NRC, SERC, and LEPC. If the exceeding release is a new, continuous and stable release, it may be established as a continuous release through the same procedure – telephone and written notification – as any other continuous release. *See id.* § 302.8(g)(2).

A change in previously submitted release information includes a change in the composition or source of the release, or a change in the information submitted in the initial written notification. *See id.* § 302.8(c)(4). A change in source or composition will be considered a "new" release and "must be qualified for reporting [as a continuous release] by the submission of initial telephone notification and initial written notification…as soon as there is a sufficient basis for asserting that the release is continuous and stable in quantity and rate." *Id.* § 302.8(g)(1).

If a change in previously submitted release information includes a change in other information initially included in the written report, written notification of the change must be submitted to the EPA within 30 days of a determination that the old information is no longer valid. *See id.* § 302.8(g)(3).

Question 3. Could you please explain the beaver excrement reference in your testimony and how that example, stated in State report language, should be applicable to the committee's understanding of congressional intent for the application of CERCLA to animal manure generally? Would you extend this theory to both CERCLA section 104 and 106 actions? Also, please discuss your theory on the act of the creation of a naturally occurring substance rather than the circumstances in which the substance was created and how you consider that relevant to this debate? What other places did Congress exempt biological and naturally occurring processes under CERCLA?

Answer 3. Beaver excrement is at once a curious parenthetical example of the "naturally-occurring substances" that Congress exempted from response actions under section 104 and 106, and an indistinguishable case of a waste produced by biological, natural processes that exemplifies Congressional intention with respect to animal wastes, and even disease or contamination that might result from them. This exemption of biological and naturally-occurring processes does not, to our knowledge, appear elsewhere in CERCLA, but as explained below, it is, I believe, consistent to interpret CERCLA to apply it beyond the section in which it appears to section 103.

In EPCRA, Congress, recognizing that "CERCLA response authorities are extremely broad . . ." excluded from the scope of the federal response authority the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 104(a)(3)(A); *and see also* S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA's response authority, noting that naturally occurring releases, such as "diseases or contamination resulting from animal waste (e.g. beaver excrement)," are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena, are excluded from EPA's response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air cattle operations fall, we believe, within the purpose and terms of this exemption from EPA's response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely "where it is naturally found," i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and applied to croplands. That movement does not, we understand, materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer.

Generally, a statute should be interpreted as a whole, and the individual provisions should be analyzed in accordance with the object and policy of the entire law. *See Abramson v. U.S.*, 42 Fed. Cl. 621, 629 (1998) (citing *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)). "In construing a statute, courts should not attempt to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Id.* (citing *Boise Cascade Corp. v. U.S.*, 942 F.2d 1427, 1432 (9th Cir. 1991)). To require a facility to report a release of a naturally occurring substance would not only be inconsistent with Congress' clear intent under § 104 to exclude such substances from the federal government's management under CERCLA and EPCRA, but it would also lead to the incongruous result of reporting releases under § 103 that would never be responded to under § 104.

Because the purpose of reporting a release under § 103 is to alert the proper authorities of the release so that they can best determine how to respond to the release, it would be superfluous to require reporting for a release that is statutorily excluded from the federal government's response authority. While the legislative history indicates that Congress only intended to cover modern chemical technology, synthetic chemicals and man-made processes and substances, even if CERCLA and EPCRA were interpreted to cover flatulence, manure, urine and their decomposition, the resulting ammonia and hydrogen sulfide from them falls fairly within the statutory exclusion of "naturally occurring substances" from response action.

If response action for those releases is prohibited, it then makes sense to interpret CERCLA § 103 reporting requirements not to include those substances and activities, because to do so would render the release reporting requirement of section 103 superfluous. Indeed EPA has so interpreted the "naturally occurring substance exemption" in the case of radionuclides from undisturbed lands. 63 Fed. Reg. 13460, 13462, col.2 (March 19, 1998), declaring that: "[r]eporting of naturally occurring radionuclide releases from undisturbed land holdings is unnecessary because CERCLA section 104(a)(3) generally precludes removal or remedial actions in response to a release "of a naturally occurring substances in its unaltered form or altered solely through naturally occurring process or phenomena, from a location where it is naturally found."

EPA has stated the purpose for release reporting notification under CERCLA, and its interpretation of authority for granting exemptions, in cases where the release does not already fall clearly within a statutory exemption, as follows:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require 'notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.' [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist."

54 Fed. Reg. 22524, 22528.

Based on this interpretation, EPA exempted release of naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction." *Id.*

With respect to disturbance of large areas of land, such as farming that caused releases of RQs of radionuclides, EPA concluded that those "activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted "the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers." *Id.* EPA explained that it did so because "the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement." *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

> "will always be emitted continuously at low levels spread over large areas" [and] "never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal

> regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released."

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance "to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2. It stated its authority to do so as follows:

> CERCLA sections 102(a), 103, and 115 together provide EPA with authority to grant administrative reporting exemptions. Such exemptions may be granted for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate. Requiring reports of such releases would serve little or no useful purpose and could, instead, impose a significant burden on the Federal response system and on the persons responsible for notifying the Federal government of the release. Through such reporting exemptions, therefore, the Federal response system is able to more efficiently implement CERCLA and EPCRA and more effectively focus on reports of releases that are more likely to pose a significant hazard to human health and the environment.

63 Fed. Reg. 13460 (Mar. 19, 1998).

EPA's interpretation of the scope of the naturally occurring substance exemption, and its authority to broaden it to cover other activities where response action is inappropriate, infeasible and unnecessary, have evident application, we believe, to CERCLA's coverage of animal waste, and in particular animal waste from cattle operations. First, EPA's determination that activities that fall within section 104(a)(3)'s exemption from response action need not report under section 103 means that if cattle operations fall within section 104(a)(3)(A)'s exemption of naturally occurring substances, there is no need to report such releases under section 103 of CERCLA.

Second, NCBA believes that manure falls within the criteria under which EPA has exercised its authority to exempt activities that result in low exposure and slow release over large areas to releases that pose little risk and disperse quickly, making response infeasible and inappropriate.

Question 4. You mention radio nuclides as a substance that EPA considers hazardous but does not require reporting for under CERCLA or EPCRA. Are there others? Also, could you please speak to how natural attenuation actually resolves some environmental problems without CERCLA needing to be invoked – like manure dispersal from adverse hurricane events that causes a short term problem, but not a long-term reporting or response need?

Answer 4. See answer to question 3 on the specific operations exempted from radio-nuclide release reporting. These are the only EPA rulemaking determinations of which we are aware made under the naturally-occurring substances exemption. There may be others. With respect to natural attenuation, see the discussion above in answer no. 3 with respect to EPA's criteria for the radionuclide exemption, namely that the release that result in low exposure and slow release over large areas to releases that pose little risk and disperse quickly, making response infeasible and inappropriate. We believe that those criteria are applicable to manure.

Question 5. Some people will argue that there is no federal response or cleanup authority outside of CERCLA. Your testimony mentions several statutes that cattle operations must follow. I am intrigued by the CAFO permit under the Clean Water Act. What are the sanctions if a person violates their permitted allowance? Without CERCLA, would exceeding permitted levels of manure be an easy option for a "bad actor" to pursue without consequences?

Answer 5. The sanctions for violation of a CAFO's discharge permit under the Clean Water Act include severe civil and criminal penalties for each day of violation. The basic monetary penalties range up to $25,000 per day (subject to an escalation provision) for a first violation, and up to $50,000 for additional violations, as well as imprisonment in the case of criminal violations. Injunctive relief is also available.

The argument that there is no cleanup authority outside of CERCLA is clearly spurious. The Clean Water Act's Spill Prevention and Control Provisions, the Clean Air Act's Accidental Release control requirements, corrective action under the Resource Conservation and Recovery Act, and numerous other requirements apply to statutorily-mandated remediation of spills and releases. CERCLA was not, I believe, intended to supplant these authorities, but to fill in gaps in extraordinary situations. NCBA submits that there is no need for such extraordinary relief in the case of manure.

Question 6. Your testimony spoke exclusively to ammonia and hydrogen sulfide, but did not mention phosphorus. Do beef cattle not emit phosphorus as part of their belching, flatulence, or manure?

Answer 6. The brief filed by the Texas Department of Agriculture ("TDA") in *Waco v. Schouten, et al.* (No. W-04-LCA-118, W.D. Tex.)on the issue of whether emissions from dairy cattle animal waste include phosphorus that is the target of CERCLA regulation was entered into the record of the Subcommittee's hearing on this matter. It provides perhaps the best answer to this question . It concludes that orthophosphates and other compounds are not covered by CERCLA. NCBA finds the presentation made by TDA authoritative and persuasive. Holland & Hart has not independently investigated this issue on behalf of NCBA.

Answers to Questions Submitted to the National Cattlemen's Beef Association by Honorable Heather Wilson, R-NM

Question 1. New Mexico has one of the highest per herd averages, with over 1,600 cattle per herd. How does the NCBA feel about classifying farms of different sizes under different amounts of Superfund liability?

Answer 1. Manure from cattle operations is either applied to nearby croplands or composted and sold as fertilizer. These natural fertilizers are a valuable commodity and resource in America's agriculture. Manure from cattle operations is not concentrated or treated in waste lagoons. There is, NCBA submits, no rational basis for treating manure or composted fertilizer from smaller operations any differently than the same material from larger operations. In fact, it would be entirely arbitrary to do so, since it is identical.

Attaching CERCLA liability to manure, or composted fertilizer from it, by classifying them as "hazardous substances" is a bad idea for either large or small operations. One need only consider whether an organic farmer or any other user would apply a hazardous substance to crops. Such a classification would stigmatize and doom such natural fertilizers in the marketplace. Organic farms that applied such natural fertilizers to their crops would presumably no longer be organic. Making such fertilizer a hazardous substance would logically have the effect of ending its beneficial use as a nutrient and make it a waste that no one would accept. That result is not desirable for large or small ranchers or feeders of cattle. Any CERCLA liability attaching to manure would adversely affect its use and recycling as fertilizer.

Question No. 2: Why do you think that these cases in Texas and Oklahoma have been brought under Superfund liabilities and not under the Clean Water Act or other statutes that these farms are already regulated under?

Answer 2. CERCLA is the most severe, drastic and inequitable of all environmental laws. It imposes "strict" liability that normally attaches only to the most inherently hazardous activities, with no need to demonstrate negligence or lack of reasonable care. It applies joint and several liability, making an insignificant contributor responsible for the entire cost of any cleanup or remedy. It applies retroactively, and there is no contemporaneous judicial review of EPA's cleanup orders. They must be carried out at the risk of treble damages, with no chance to present the matter to a court before the action is carried out.

The Superfund Laws were intended to be applied when the Clean Air Act, the Clean Water Act and numerous other state and local laws were unable to do the job and had failed, or when a hazardous waste site had been abandoned, and its toxic legacy required cleanup, or when existing laws were inadequate. NCBA does not believe that such laws have failed, nor that any showing has been made that their application to manure from cattle operations is inadequate -- nor could such a showing be made

One would have to ask those who brought the suits why they have picked the use of the most heavy-handed law as the weapon of first choice.

Question 3. We've heard about the Air Consent Agreement that took place between some farmers and the EPA. Will this consent agreement have any impact on whether or not dairy farms and other farms are regulated under Superfund laws?

Answer 3. Litigation, and the threat of litigation is real. Faced with that threat, hundreds of operations have accepted the protection from enforcement offered by the consent agreement with EPA. It is regrettable that the coercion represented by the possibility of the application of the Superfund laws to these operations by the courts has resulted in such operations paying fines or penalties and agreeing to bear the expense of developing regulatory tools. Unfortunately, the question of whether CERCLA applies to such operations has not been presented or litigated, and the risk that a forum picked by an advocacy group might impose CERCLA on such operations is real. NCBA believes that the Superfund laws, fairly applied in accordance with their purpose and intent, do not apply to cattle operations. It is unfortunate that some farmers and dairymen have felt it necessary, under the gun, to submit to the consent agreement. That agreement does not admit either liability or the application of the Superfund laws to the operations in question, but agrees to comply with them.

Question 4. At New Mexico State University, researchers are working on a plan to use excess cow manure to harvest methane gas through a digester system. Is this something other states are looking into doing as well, and does a digester system create a viable alternative use for manure?

Answer 4. Manure collection is the key to the success of a methane digester. Dairies and hog operations have the ability to collect waste multiple times a day while beef cattle operations typically collect 1 to 2 times annually. Also, unlike hog facilities and most dairies that are on concrete, beef feedlots are dirt lots and the manure contains dirt, sand and rocks which are problematic for a digester.

Because of the size of pens, ±150 square feet per animal, collecting more frequent than every 60 to 75 days is not reasonable. Fresh beef manure will produce approximately 6 ft3/lb of volatile solids, producing 60 to 70% methane as manure volatile solids decompose and are lost. Ninety-day old solids will yield approximately 3.4 ft3/lb volatile solids, and a once a year lot scraped manure will yield only 2.9 ft3/lb volatile solids.

The problems with collection, foreign material in the manure and the low gas production makes a digester for a feedlot marginal.

Question 5: Mr. Connery, you said that you believed that Congress did not intend to regulate manure as a Superfund hazardous substance. What is your basis for that view?

Answer 5. The basis for that view is an exhaustive review of the Superfund laws in connection with our determination of whether the emergency release reporting provisions of CERCLA applied to cattle operations. The inquiry started with the words of CERCLA itself, which applied these requirements to the "release" of "hazardous substances" from "facilities" into the "environment." In applying these terms to the natural and biological processes by which manure from cattle is deposited in the fields and pens of cattle operations, and recycled onto croplands and composted as fertilizer, we found that the terms used did not clearly or comfortably fit cattle operations. In such cases, the courts go the purposes of the statute to guide its interpretation. As one eminent court noted, "Attention must always be given to what Congress sought to accomplish by the statute. . . 'There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of oversolicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it" (quoting *Federal Deposit Insurance Corporation v. Tremaine,* 133 F.2d 827, 830 (2d Cir. 1943), *Billik v. Berkshire,* 154 F.2d 493, 494 (2d Cir. 1946). Surely one winces at concluding that cattle defecating are facilities releasing hazardous substances into the environment, or that those words match or "fit" what Congress intended.

Our comprehensive review of the legislative history of what Congress intended to cover under the CERCLA laws found a litany of references to "synthetic," "man-made" chemicals, "chemical contamination," and the results of "modern chemical technology" as the problems CERCLA intended to address. S. Rep. No. 96-848 at 2-6, 12 (1980); S.Rep. No. 99-11 at 1-2 (1985); S. Rep. No. 99-73, at 12 (1985); H.R. Rep. No. 99-253, part 5, at 2 (1985). It contained no reference to an intention to clean up manure or urea, or their byproducts, from cattle or any other animal agricultural operations.

At the same time, whenever the legislative history did refer to livestock or agriculture, it did so in the context of protecting those activities from the hazards it was addressing. For instance, the Senate committee stated that the legislation was intended to cover "spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health" S. Rep. No. 96-848, at 5 (1980) and commented that such releases have resulted in the "loss of livestock and food products to contaminated drinking water and feed . . ." *Id.* It also noted that Superfund "may be used to compensate an agricultural producer . . . for loss" resulting from such releases of hazardous substances" *id.* at 78, and that such losses included injury to "livestock" *id.* at 79. Livestock operations were viewed as needing protection, not as a source against which others might need protection.

Another indication that Congress did not intend to cover the natural generation of substances like ammonia from the bacterial decomposition of nitrogen in soils and manure was found in the taxation provisions of CERCLA. Those provisions state that substances like ammonia, when used for agricultural purposes, are not covered by the taxation provisions of CERCLA. Specifically, "nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, ... [or] when used as a nutrient in animal feed," are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); *see also* S. Rep. No. 99-73, at 9 (1985).

It would be anomalous not to tax ammonia used in agriculture if Congress intended to require its cleanup from those operations. The exemption is based largely on the premise that "taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which appears to be unnecessary." *Id.* Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would constitute an "unnecessary burden" on Cattle Operations.

From these indications, we concluded that the Superfund laws for release reporting were not intended to cover the biological and natural processes producing manure at cattle operations, and indeed were intended to protect such activities from man-made, synthetic, manufactured chemicals produced by modern technology. This conclusion was fortified by a consideration of Congress's exclusion of "naturally-occurring substances" from CERCLA "response" or cleanup authority. Congress, recognizing that "CERCLA response authorities are extremely broad . . ." excluded from the scope of the federal response authority the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 104(a)(3)(A); *and see also* S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA's response authority, noting that naturally occurring releases, such as "diseases or contamination resulting from animal waste (e.g. beaver excrement)," are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena were, we believe, intended by Congress to be excluded from EPA's response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA's response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely "where it is naturally found," i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The precipitation and surface runoff affecting them are naturally occurring processes. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The "normal application of fertilizer" is separately excluded from the definition of CERCLA "releases". 42 U.S.C.A. § 101 (22).

Some might argue that livestock are not "naturally" contained within fenced pens or in the large numbers involved in modern Cattle Operations. However, this ignores that the CERCLA exemption is directed at whether the *substance* is naturally-occurring, not at the context or circumstances in which the substance might be released.

For reasons that apply with equal force to livestock operations, EPA has exempted from release reporting under CERCLA several substances that are not considered to present risks that warrant regulation under CERCLA. The agency has found reporting of such releases not to be consistent with the purposes of CERCLA release reporting:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require 'notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.' [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist."

54 Fed. Reg. 22524, 22528.

Based on this interpretation, EPA exempted release of "naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction." *Id.*

With respect to disturbance of large areas of land, such as farming that caused releases of "reportable quantities" of radionuclides, EPA concluded that those "activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted "the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers." *Id.* EPA explained that it did so because "the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement." *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

> "will always be emitted continuously at low levels spread over large areas" [and] "never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released."

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance "to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2.

On balance, and read fairly in accordance with their purpose, we believe that the Superfund laws were not intended to cover manure from cattle operations or other animal agriculture. One winces at the strained and distorted interpretations that would reach the conclusion that they are covered. At the same time, Congress stated that it intended to protect livestock and agriculture from the hazards it intended to address under the Superfund laws, and excluded a category of "naturally-occurring substances" we believe covers animal waste.

Question 6: You said you regard Superfund laws as unreasonable for application to cattle operations. Why?

Answer 6. I have tried to answer this question in my answer to question 2 above, noting that the Superfund laws are the most draconian and inequitable of our environmental laws, applying strict, joint and several, retroactive liability, and allowing cleanup without judicial review or recourse, at the risk of treble damages. These laws are an extreme response to a set of extreme cases, like Love Canal and Times Beach. They were surely never intended by Congress to apply to cattle operations or agriculture. Manure is even more clearly beyond the pale of any rational conclusion that can be reached after a careful and objective review of the legislative history. It is emblematic of the tenuous and indefensible grounds for arguing that manure is a hazardous substance that there was no assertion of that position for more than 20 years after the Superfund laws were passed.

It is an inexplicable omission that Congress would not have even mentioned or provided for the extraordinary impact that Superfund regulation would have had on animal or other agriculture, or that Congress would not have provided funding for cleanups and fair notice of the impacts of the involvement of tens of thousands of agricultural and ranching operations under CERCLA. Any honest assessment of the coverage of this 1980 Superfund law and its progeny, must acknowledge that historically it was not intended to cover manure from animal agriculture, and face up to the issue of whether there is any sound reason to treat manure from animals, or humans for that matter, as extremely hazardous and toxic after compliance with the multiple, stringent, environmental laws of this nation.

Question 7: Our Committee heard considerable discussion of the exclusion that applies to the "normal application of fertilizer" and how that provisions shapes the current debate over the new concepts for expanded coverage of the Superfund laws. Please comment on whether that provision indicates that manure should or should not be covered under the Superfund laws.

Answer 7: Congress did exclude the normal application of fertilizer from the definition of release. The Senate Environment and Public Works Committee noted in its report on CERCLA that fertilizers (it was clearly referring to synthetic fertilizers in the particular passage) do contain listed hazardous substances and that, absent an exclusion, applicators of such manufactured fertilizers would be subject to the reporting and liability provisions of CERCLA. *See* S. Rep. No. 96-848, at 46 (1980). The Committee did not state that because synthetic chemical fertilizers contained hazardous substances, they were subject to these applicable CERCLA provisions. To the contrary; with little further discussion, the Committee summarily stated that the normal application of such fertilizers containing hazardous substances would not be considered a release. If the release of synthetic, processed chemical fertilizers containing hazardous substances from the normal application of fertilizer is exempt from CERCLA's requirements, it is bafflingly inconceivable that naturally-occurring gases from the breakdown of manure, and composted fertilizer derived from it should not be exempt. Indeed, we think that manure and composted fertilizers derived from it also fall within this exemption.

The legislative history of CERCLA shows that Congress intended both over-application and transportation spills of synthetic, commercial chemical fertilizers to be a regulated release not covered by the exemption for the normal application of fertilizer. S. Rep. No. 96-848, at 46 (1980). This treatment is completely consistent with Congress's focus on synthetic chemical fertilizers. NCBA does not believe that the limitation of this exclusion to normal application of such fertilizers indicates an intention to regulate manure from animal agriculture.

Answers to Questions Submitted to
the National Cattlemen's Beef Association
by Honorable Charles F. Bass

Question 1. I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?

Answer 1. I defer to the expertise and experience of the representative of the dairy cattlemen on the panel.

Question 2. The funding levels for the Environmental Quality Incentives Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79 million in EQIP funds but already has a backlog of $1.41 million in requests for projects it can't fund. With the uncertainty of agriculture programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my question is, without a substantial increase in this program will producers be able to get their operations in compliance?

Answer 2. The cost of treating manure as a hazardous substance are incalculable. They most assuredly have not been contemplated or provided for as a cost of doing business, or an extraordinary, justified cost of agriculture or cattle operations.

Answers to Questions Submitted to the National Cattlemen's Beef Association by Honorable John D. Dingell and the Honorable Hilda L. Solis

Question 1. In your testimony, you stated that Congress should consider the adequacy of existing environmental regulations. For each of the following air pollutants emitted by animal feeding operations, please state (i) whether emissions of that pollutant from animal feeding operations are regulated under the Federal Clean Air Act and, if so, describe the manner in which they are regulated, and (ii) whether emissions of that pollutant from animal feeding operations are regulated under State clean air acts, and, if so, describe the manner in which they are regulated and the number of States that have such regulations.

(a) Ammonia
(b) Hydrogen sulfide
(c) PM2.5
(d) Coarse particles
(e) Volatile organic compounds
(f) Nitrogen oxides

Answer 1. Each of the substances listed is subject to regulation under the Federal Clean Air Act, as required to protect public health or welfare. For instance, ammonia or hydrogen sulfide could be regulated as hazardous air pollutants under section 112 of the Clean Air Act. They are currently not listed as hazardous air pollutants under that section, but are covered for several specific types of operations, such as petroleum refineries, or chemical fertilizers plants.

PM2.5 is an indicator of combustion particulate matter. That is not a significant emission from cattle operations. Coarse particle are widely subject to fugitive dust control regulations at the state level, requiring specific emission control requirements, such as opacity limitations, or approved control measures, such as watering roads, wind-breaks, or speed limits on roads. Volatile organic compounds are regulated generally as precursors to ozone, an urban pollutant. The toxic fraction of VOCs , namely BETX, are not, to my knowledge, at all associated with animal operations. I have not investigated and am not familiar with any concern with nitrogen oxides from animal operations If there were significant nitrogen oxides emissions from animal operations, they would be required to meet the national ambient air quality standard for nitrogen oxides in 40 C.F.R. part 50, which are enforced by requiring states to adopt State Implementation Plans attaining such standards.

Many are also subject separately to state air laws that regulate ammonia, hydrogen sulfide on the basis of best available control technology, or allowable ambient concentrations. At the Subcommittee's hearing on this matter, NCBA brought several feet of state regulations to which cattle operations are subject. It would require the writing of a legal treatise to summarize those laws and regulations and their applicability, state-by-state, to animal operations. NCBA has those laws and regulations and is willing to make them available or to submit them for the record if the Subcommittee so desires.

Question 2. How many head of cattle would likely trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day? Please provide the basis for your calculation.

Answer 2. EPA has a standard emissions factor document for use in estimating emissions from a wide variety of operations. The document, "Compilation of Air Pollutant Emission Factors" is generally known as "AP-42". Its estimates generally reflect testing and sampling of several representative sources, giving an average that may be used for broad estimation purposes, but is not expected to be accurate for any particular operation. EPA posts current information and updates on AP-42 on its web site. AP-42 covers the "Food and Agriculture Industries" in Chapter 9. Section 9.4 of Chapter 9 covers "Livestock & Poultry Feed Operations." As of August 13, 2002, section 9.4 states that "At this time, there is no "AP-42 factor" or estimation method for this category." (July 14, 1999 update). (Copy attached as Attachment 3). The document does reference "Development and Selection of Ammonia Emission Factors" (EPA 1994) which does make emission estimates for ammonia from livestock operations, but does not adopt those factors as standard emission factors for regulatory use. The Table of Contents of AP-42 to section 9 references the interim report of the National Academy of Sciences ("NAS") Committee on Air Emissions from Animal Feeding as intended to assess the scientific issues involved in estimating air emissions from animal feeding operations. That interim report (as well as the final report) concluded that there is insufficient information for adequate estimation of those emissions at the current time. "The Scientific Basis for Estimating Emissions from Animal Feeding Operations: Interim Report" (NAS 2002), chs. 2 & 3 at pp.15-42 In addition, there have been various studies in Iowa, Kansas, and elsewhere making crude estimates based on material balance and other techniques. None of these efforts at estimation have been judged sound enough by EPA or the scientific community to support regulatory determinations or emission estimates.

The measurement of ammonia from flatulence and decomposition of manure and urea, as well as particulate matter, volatile organic compounds and other substances from cattle operations in open air pastures and feed lots is problematic at best. Direct measurement is not possible or feasible. Because the pollutant is dispersed in the air before measurement (in other words, already a "cloud"), the wind speed and direction, pressure and temperature, stability and mixing characteristics of the atmosphere affect the emission, and measurement depends on capturing the whole cloud in time and space. A vertical and horizontal array of tens of instruments upwind and downwind of the source being measured covering sufficient area is necessary, as is a complete set of meteorological instrumentation and data (wind speed, direction, mixing height, pressure, etc.). Because these arrays still only measure concentrations at a relatively few points in a cloud of indeterminate size and shape over short periods of time, they are subject to very large error. In order to estimate the quantity of emissions, the concentration data from several points in the array must be mathematically modeled, spatially averaged, and projected to simulate the cloud's form and density. Because of the impracticality and cost of operating these large arrays, and their large margin of error, quantitative emission limits for open-air fugitive operations are not a practical air pollution control technique or enforcement tool. Typical air pollution control regulations for open-air fugitive sources prescribe best management practices or control techniques, such as watering, dust suppressants, speed limits, and wind breaks.

Evidently the ammonia produced by cattle and the hydrogen sulfide potentially produced by some ponds with some sulfur will vary with characteristics of the ration fed to the cattle, the breed of cattle, the acidity and other conditions of the digestive tract, hydration, heat, and the characteristics of the water in the retention ponds. In other words, there are a large number of variables, each of which would have to be held constant while others are varied, in order to derive emission factors. This may well be impractical. Even with inanimate, inert particulate matter, like fugitive dust, the error in estimation of the amounts emitted in open-air land disturbance has proved to be often an order of magnitude or more - - hardly adequate or appropriate for regulatory determinations or the imposition of quantitative controls.

The possible use of some of the estimated emissions quantifications to date has been of concern to representatives of agriculture. Congressman John Boehner expressed that concern to then EPA Administrator Christine Todd Whitman, who responded in a letter to Congressman Boehner dated November 9, 2001 that:

> "As you note in your letter, **we do not currently have sound emission estimates to support regulatory determinations for animal agriculture."**

(Emphasis added.)

It is fair to conclude that there is not a valid or sound scientific basis for the estimation of fugitive ammonia, hydrogen sulfide, particulate matter, or other emissions from animal agriculture and feeding, nor sound emissions estimates to support regulatory determinations, based on no less authority than EPA's Administrator, the NAS interim review, and EPA's latest updates and assessments. Thus there is no accepted method for reasonable quantification of fugitive ammonia, hydrogen sulfide, particulate matter or other emissions from cattle operations. As a result, there is no sound or reasonable basis for making a regulatory determination whether the ammonia or hydrogen sulfide from fugitive emissions from cattle operations do or do not exceed the reportable quantities of those substances from individual cattle operations. Because cattle operations are not a listed source, and their nonfugitive emissions do not exceed the thresholds for Clean Air Act major sources in attainment or unclassifiable (Prevention of Significant Deterioration) or nonattainment (NSR) areas, nor for Title V Operating permits, there is no need to quantify their fugitive emissions for purpose of determining Clean Air Act permit applicability requirements.

Question 3. Have any cattle feeding operations ever reported under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Emergency Planning or Community Right-To-Know Act (EPCRA) for releases of ammonia or hydrogen sulfide above the reportable quantity limit? If so, please identify them and provide the amounts reported.

Answer 3. Only the National Response Center would be able to answer this question. To my knowledge, no cattle feeding operations have made such reports. However, I have made no inquiry or investigation of the subject.

Question 4. Has any cattle feeding operation ever been the subject of a citizen suit for failure to report releases above the reportable quantity limits under CERCLA and EPCRA? Have any penalties ever been assessed against cattle operations as a result of a citizen suit for failure to report?

Answer 4. Again, I have made no investigation of this subject, nor done comprehensive research on the matter. While CERCLA citizen's suits have been filed and decided with respect to other animal agriculture, to my personal knowledge, none have been filed against cattle operations.

Question 5. Do you believe that "manure" should be treated the same as chemical fertilizers for the purpose of "the normal application of fertilizer" exclusion from the definition of "release" under Superfund?

Answer 5. See answer no. 7 above to the question posed by Representative Wilson. I believe that if chemical fertilizer containing hazardous substances is clearly subject to this exclusion, it would be illogical to read it as implying that manure was somehow covered.

Question 6. Is it correct that the Environmental Protection Agency conducted an extensive risk assessment when it exempted radionuclides from the Section 103

reporting requirements of CERCLA? Has any similar risk assessment been performed for animal feeding operations relating to cattle?

Answer 6. I do not recall whether EPA performed a formal risk assessment on the radionuclides it exempted from the categories of facilities, including farms, discussed above. It did conclude that those risks did not warrant release reporting. I do not know whether EPA or others have done risk assessments on cattle operations. I know of none.

The Honorable Paul E. Gillmor

1. You state in your testimony that if normal animal manure is found, either in the Waco or Oklahoma case, to be a hazardous substance under CERCLA, then virtually every farm operation in the country could be potentially exposed to liabilities and penalties under the Act. Many of the witnesses have argued that this potential liability is only significant for the major, vertically integrated agribusiness operations. Can you explain what the real world exposure is to the small farmer and small business animal feeding operations under both the reporting requirements violations and the larger general response authority and cleanup liability?

   Despite the misleading suggestion of many anti-animal agriculture groups, "superfund" liability for manure is NOT a small versus large issue. Based on initial studies and indicators, we expect that even mid-size and possibly even relatively small livestock and poultry operations could be subject to reporting requirements and liability for emissions and releases from manure. Farm Bureau is also concerned about liability for crop-based operations that lawfully use and apply manure as fertilizer.

   In contrast to agriculture's challenges with regulation under the Clean Water Act and other environmental laws, liability for regulated substances under CERCLA and EPCRA is measured at much smaller levels (e.g., emission or release of 100 pounds per year of ammonia). This means that farmers and ranchers would assume that normal, otherwise lawful production of animals and crops makes them vulnerable, regardless of whether they are considered "large" by industry standards. We believe that the uncertainty created by the federal courts could likely make some farms, even entire watersheds, eligible as "superfund" sites!

   Farm Bureau would also like to address this issue of liability only for "vertically integrated agribusiness operations." Most of the poultry supplied to large poultry integrators comes from small and medium family poultry operations. It is true that when people talk about the Oklahoma lawsuit they think in terms of large corporations. Lost in that discussion, however, is the fact that the person who owns the land and manure that would be considered contaminated and hazardous is the small and medium sized family farmer who has a contract with the integrator. These farmers cannot afford to defend themselves in large complex superfund lawsuits. They will in fact likely just have to go out of business.

2. How is the farming community already addressing the concerns being brought through the response authorities and natural resource damages claims under Superfund, and specifically the Oklahoma case? What are the other means of regulatory controls and have these been applied to the OK case?

   Oklahoma has addressed water quality concerns through regulatory and non-regulatory mechanisms, including legislation, rulemakings (water quality standards), the federal-state 319 nonpoint source program, state income tax incentives and USDA conservation cost-share programs. As noted below, Oklahoma was one of the first states in the nation, if not the first state, to require animal waste management plans using phosphorus as the limiting factor, rather than nitrogen. Oklahoma's state law regulating poultry operations exceeds the requirements for poultry operations under federal law.

   In May 1997, then-Governor Frank Keating appointed an Animal Waste and Water

Quality Protection Task Force requesting a final report before Dec. 1, 1997. On December 4, the governor signed executive orders directing two state agencies to begin implementing key recommendations of the report. That same month, the governor signed emergency rules for chicken farms, requiring commercial poultry operations to obtain or apply for an approved animal waste management plan, addressing nitrogen and phosphorus by Jan. 1, 1999, or if within a (nutrient) threatened watershed, by June 1, 1998.

In April 1998, the Oklahoma USDA NRCS revised their Conservation Practice Standard, Waste Utilization (Code 633) with a provision specifically for the Eucha/Spavinaw Watershed (part of the city of Tulsa's drinking water supply) in Oklahoma and Arkansas. The standard applied to the Oklahoma portion of the watershed and restricted poultry litter application on land with a phosphorus index of 300 lbs/acre or greater.

On July 1, 1998, legislation became effective which regulated commercial poultry feeding operations in Oklahoma.

In July 1, 2000, an Oklahoma Water Resources Board rule defining nutrient limited watersheds and nutrient limited groundwater became effective. Based on the law passed in 1998, poultry producers in nutrient limited watersheds and nutrient limited groundwater areas are required to test their soil prior to litter application every year, rather than every three years as is required for non-nutrient limited watersheds.

In April 2001, the Oklahoma USDA-NRCS published Conservation Practice Standard, Nutrient Management (Code 590) replacing the Waste Utilization (Code 633) standard from 1995 and 1998. The new standard made phosphorus, rather than nitrogen, the limiting factor in all nutrient management plans. In non-nutrient limited watersheds, the phosphorus index has an upper limit of 400 lbs/acre, after which no additional litter may be applied. In nutrient limited watersheds, 300 lbs/acre is the threshold. The standard is applicable statewide. Although the Oklahoma USDA NRCS is not a regulatory agency, state law requires animal waste management plans for registered poultry feeding operations to use the NRCS (Code 590) standard.

In April 2003, Arkansas Governor Mike Huckabee signed three new state laws to regulate nutrients in Arkansas: 1) the Arkansas Soil Nutrient Management Planner and Certification Act; 2) the Arkansas Poultry Registration Act; and 3) the Arkansas Soil Nutrient Application and Poultry Litter Utilization Act.

In December 2003, Oklahoma and Arkansas signed a "Statement of Joint Principles and Actions," outlining how the states would work together to improve water quality in Oklahoma's scenic rivers. From the "Statement of Joint Principles:"

> *The states agree to work on a joint watershed plan, as follows: The states of Arkansas and Oklahoma, acting through their environmental agencies, will work together in partnership with the Arkansas-Oklahoma Arkansas River Compact Commission toward the goal of producing a Watershed Plan. (Note: EPA's Clean Water Act Section 319 guidance sets out nine elements for a Watershed Plan.)*

It is Farm Bureau's understanding that pursuing a watershed plan has been put on hold, pending the outcome of the Oklahoma Attorney General's litigation. This issue is the subject of a Motion for Leave to File Bill of Complaint filed by Arkansas Attorney General, Mike Bebee, to the U.S. Supreme Court on Nov. 3, 2005.

Fortunately, the litigation has not stopped the efforts of private individuals to address water quality concerns within the Illinois River watershed. At this time, the citizen-based Illinois River Watershed Partnership is organizing to become a non-profit 501(c)(3). The Arkansas Farm Bureau has assisted the fledgling partnership in its organization. The partnership is not affiliated with any state or federal agency; however, it is made up of landowners and stakeholders within the Illinois River watershed in Oklahoma and Arkansas. Their purpose is to work together on voluntary projects to address water quality concerns within the watershed. One of their goals is to put together an Oklahoma-Arkansas watershed management plan for the watershed.

Under state law, the Oklahoma Department of Agriculture Food and Forestry has jurisdiction over point and nonpoint source pollution relating to agriculture production. The department may take legal action against polluters at any time it deems necessary. Whereas, the Oklahoma Department of Environmental Quality is responsible for almost all other types of nonpoint source pollution (except oil and gas related pollution) and has jurisdiction over homeowner septic tanks. The state DEQ (ODEQ) also has statutory authority for Total Maximum Daily Loads (TMDL) in Oklahoma. ODEQ either has drafted or is in the process of drafting a TMDL for the Illinois River watershed. This project has been in development for a number of years. A completed TMDL could provide water quality data for the states to review and could serve as a springboard for additional discussion between the states.

In the past, the Illinois River watershed has been named a 319 priority area by the Oklahoma Conservation Commission, which targeted funds to the watershed and used cost-share monies to fund several educational conservation practices. Additionally, there are 319 (nonpoint source funds from the Oklahoma Conservation Commission) and Oklahoma USDA NRCS program funds being used to move litter out of sensitive areas.

A variety of incentives have been utilized to move poultry litter out of nutrient limited watersheds. In 2004, the Oklahoma legislature created a $5 per ton poultry tax litter credit. There is an annual cap on this fund of $375,000. In 2005, the legislature extended the tax credit for three more years.

The Oklahoma USDA NRCS uses a program called Statewide Manure Transfer Resource Concerns. Potential environmental concerns relative to the management of animal wastes in Oklahoma's Nutrient Limited Waters (NLW) and Scenic River watersheds continues to be a high priority. As a result, new Statewide Manure Transfer Resource Concerns have been developed to address the two primary objectives: (1) Create an incentive to distribute animal manure to areas of the state that have historically not used animal manure as a fertilizer; and (2) Promotion of a long-term market for animal manure as a fertilizer around the state.

Lastly, the Oklahoma USDA NRCS has a program to provide assistance for Animal Waste Management for Animal Feeding Operations statewide. These funds are available *only to existing and expanding beef, dairy or swine confined feeding operations. A lower priority is given to operations that are planning expansion beyond current levels or capacity, and all applications for new facilities and poultry operations are ineligible for evaluation under the Statewide AFO/CAFO Resource Concern Criteria. This allows AFO/CAFO operations to apply for Environmental Quality Incentive Program financial assistance for the storage, treatment and utilization of animal waste.*

The Honorable John Sullivan

1. If one of these federal lawsuits finds that the animal agriculture industry is liable under CERCLA for the release of hazardous materials, how will the family farmer be affected?

   If CERCLA and EPCRA liability extends to manure, families who depend on farming to pay the bills are the most vulnerable. Despite the misleading suggestion of many anti-animal agriculture groups, "superfund" liability for manure is NOT a small versus large issue. Based on initial studies and indicators, we expect that even mid-size and possibly even relatively small livestock and poultry operations could be subject to reporting requirements and liability for emissions and releases from manure. Farm Bureau is also concerned about liability for crop-based operations that lawfully use and apply manure as fertilizer.

   In contrast to agriculture's challenges with regulation under the Clean Water Act and other environmental laws, liability for regulated substances under CERCLA and EPCRA is measured at much smaller levels (e.g, emission or release of 100 pounds per year of ammonia). This means that farmers and ranchers would have to assume that normal, otherwise lawful production of animals and crops makes them vulnerable, regardless of whether they are considered "large" by industry standards. We believe that the uncertainty created by the federal courts could likely make some farms, even entire watersheds, eligible as "superfund" sites!

2. If federal courts conclude that animal agriculture waste is a hazardous material under CERCLA, what is the potential for copycat lawsuits of this type to occur around the nation?

   Farm Bureau and other allied groups fully expect that "copycat" lawsuits will spring up all over the country if federal courts in Oklahoma and Texas conclude that any form or use of manure is subject to CERCLA and/or EPCRA liability. Sources close to the cases suggest that some in the legal community are seeing this line of litigation as creating an opportunity for the next round of "tobacco lawsuits."

The Honorable Charles F. Bass

1. The funding levels for the Environmental Quality Incentives Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79million in EQIP funds but already has a backlog of $1.41million in requests for projects it can't fund. With the uncertainty of agriculture programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my questions is without a substantial increase in this program will producers be able to get their operations in compliance?

   CERCLA and EPCRA compliance are not issues of changing "what you do" to comply: all you must do is emit or release a regulated substance in a certain quantity to trigger liability. There is no best management practice or program that can eliminate the actual "production" of manure and most of its constituents from animal agriculture. Given EQIP's program and budget constraints, no direct financial federal assistance is likely to help with either the costs associated with EPCRA's tracking and reporting nor CERCLA's inflated liability and exposure. The immediate assistance the federal government can provide, however, is to clarify that such liability simply was not envisioned by Congress and does not further legitimate environmental goals. Agricultural operations, especially those run as family operations, are simply not structured to absorb this burden and vulnerability.

2. I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?

   Many livestock and some poultry operations are federally regulated under the Clean Water Act, and most are also regulated under state environmental laws. Though challenges exist, we believe that water and air quality concerns are most appropriately addressed under these laws that use management practices and enforcement to ensure compliance. CERCLA and EPCRA are ill suited and were never intended to apply to naturally occurring processes like manure production, or to normal farming practices, like on-farm storage and beneficial use or manure as fertilizer.

   Farmers and ranchers do not believe that any additional environmental benefits come from regulating manure under CERCLA and EPCRA. Rather, applying these laws to agriculture only further frustrates efforts to maintain a viable, diverse domestic food supply. Moreover, it will undermine the goal of keeping land in agriculture and in open, green space. Farmers and ranchers face enormous pressures, not least of which is encroaching development. Adding "superfund" liability to such pressures can only increase the likelihood that families will leave farming and ranching altogether, making this land easier to develop.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. Do you believe that "manure" should be treated the same as chemical fertilizers for the purpose of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)?

   Farm Bureau believes that production, storage and beneficial use of livestock and poultry manure were never intended to be regulated under CERCLA and EPCRA. We do not believe that using manure as a fertilizer in similar fashion to chemical fertilizer should trigger any "superfund" liability or reporting requirements. It is inconsistent with the statute to suggest that use of the same fertilizer component is exempt under the law if it is produced one way but not another.

   CERCLA is neither designed nor needed to address environmental concerns relating to the animal manure. Instead, CERCLA was created to provide for clean up of toxic waste dumps and spills such as Love Canal and Times Beach, not to regulate normal production and use of agricultural byproducts.

2. Do you agree that if the discharges from animal feeding operations are permitted under Section 402 or 404 of the Clean Water Act, they would qualify as a "federally permitted release" and be exempt from liability under Superfund?

   Many livestock and some poultry operations are federally regulated under the Clean Water Act, and most are also regulated under state environmental laws. Though challenges exist, we believe that water and air quality concerns are most appropriately addressed under these laws that use management practices and enforcement to ensure compliance. CERCLA and EPCRA are ill suited and were never intended to apply to naturally occurring processes like manure production, or to normal farming practices, like on-farm storage and beneficial use of manure as fertilizer.

   Farmers and ranchers do not believe that any additional environmental benefits come from regulating manure under CERCLA and EPCRA. Rather, applying these laws to agriculture only further frustrates efforts to maintain a viable, diverse domestic food supply

3. If an animal feeding operation engages in the land application of "manure" in an abnormal manner or in amounts of significantly greater concentrations than are beneficial to crops and it results in contamination of drinking water supplies, do you believe that the animal feeding operation should be exempt from liability under the Superfund statute?

   The Clean Water Act prohibits any non-permitted release of a pollutant into any water of the U.S. Further, nearly all states have similar laws protecting waterbodies. Therefore, regardless of farm size, a producer may not pollute drinking water supplies without the risk of enforcement action.

   In the circumstance described, the operation may have already violated federal and state water laws. And, depending on the circumstances of the violation, the *lead agency is likely to take an enforcement action against the producer: that action may include fines, future operational restrictions and clean up costs. Given the current options available under existing water statutes and regulations, expanding CERCLA or EPCRA to animal manure contributes* ***nothing*** *to further protection of the environment.*

4. Is it your position that "manure" is a fertilizer and thus qualifies for the exemption from the definition of "release" for the "normal application of fertilizer" (CERCLA Section 101(22))?

   Farm Bureau believes that Congress did not intend to regulate manure under CERCLA and EPCRA. Instead, CERCLA was created to provide for clean up of toxic waste dumps and spills such as Love Canal and Times Beach, not to regulate normal production and use of agricultural byproducts.

   We believe that it would be wholly inconsistent to apply CERCLA or EPCRA to manure when the law clearly exempts the application of chemical fertilizers. Like man-made fertilizers, manure contains organic compounds – such as orthophosphate, ammonia and hydrogen sulfide – which occur naturally in the environment and are inevitable byproducts of animal manure. Several facts reinforce our belief that these statutes were not designed to regulate animal manure.

   The definition of "release" under CERCLA specifically exempts "the normal application of fertilizer." Because manure is beneficially recycled as a fertilizer and often contains the same constituents, it fits squarely within this exemption.

   Congress created the "superfund" to tax materials, such as petrochemicals, inorganic raw materials and petroleum oil, used to make hazardous products and waste. CERCLA taxation provisions indicate that substances used in animal feed are not covered within the scope of CERCLA. Specifically, "nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, . . . [or] when used as a nutrient in animal feed," are exempt from taxation. The premise of the exemption is that "taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agriculture sector which appears to be unnecessary." We believe that the same burden extends to regulating manure and is unnecessary.

   EPCRA was adopted to force reporting of releases of hazardous chemicals and to enable emergency response from local authorities when appropriate. In EPCRA, Congress specifically exempted "Any substance to the extent that it is used in routine agricultural operations or is fertilizer held for sale by a retailer to the ultimate customer" from the definition of hazardous chemical. Here to, because manure is used as a fertilizer, it fits squarely within this exemption.

Again, we stress that neither law is designed nor needed to address environmental concerns relating to animal manure.

5. What number of hogs or size of herd or flock would likely trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day?

   Despite the misleading suggestion of many anti-animal agriculture groups, "superfund" liability for manure is NOT a small versus large issue. While neither we nor EPA knows for sure how many animals might trigger reporting requirements or liability, based on initial studies and indicators, we expect that even mid-size and possibly even relatively small livestock and poultry operations could be subject to reporting requirements and liability for emissions and releases from manure. Farm Bureau is also concerned about liability for crop-based operations that lawfully use and apply manure as fertilizer.

   In contrast to agriculture's challenges with regulation under the Clean Water Act and other environmental laws, liability for regulated substances under CERCLA and EPCRA is measured at much smaller levels (e.g., emission or release of 100 pounds per year of ammonia). This means that farmers and ranchers will have to assume that normal, otherwise lawful production of animals and crops makes them vulnerable, regardless of whether they are considered "large" by industry standards. We believe that the uncertainty created by the federal courts could likely make some farms, even entire watersheds, eligible as "superfund" sites!

6. What guidance, if any, has the Administration provided to small farmers who have animal feeding operations with respect to the reporting requirements under CERCLA or EPCRA?

   EPA has not required producers to report under CERCLA/EPCRA, with the exception of some jurisdictions where the courts have directed that specific operations report.

   However, the pending lawsuits in Oklahoma and Texas threaten to compel EPA to begin requiring reporting and imposing "superfund" liability to animal agriculture nationwide.

7. How many concentrated animal feeding operations exist in the States of Arkansas, Oklahoma, and Iowa and how many have current Clean Water Act permits? For those operations that have Clean Water Act permits, do they permit the discharge of phosphorus or phosphorus compounds? If so, please describe the amounts that are permitted to be discharged and the circumstances under which discharges of phosphorus or phosphorus compounds are permitted from animal feeding operations.

   Because the federal Clean Water Act permitting program for agriculture is in the early stages of implementation, many CAFOs nationwide are in the process of applying and being reviewed for a NPDES permit. To date, here are the numbers we are aware of for each state you mentioned:

   - *In Arkansas, there are over 2000 federal CAFOs. Over 100 facilities have a CAFO NPDES general permit. Additionally, Arkansas state law* *regulates all of the nearly 400 facilities having liquid animal waste systems. Finally, over 100 facilities have a CAFO NPDES general permit. There are 4,057 registered poultry facilities in the state that do not require federal water permits because they have been deemed not to discharge pollutants. But, these producers must "register" their operation if they have 2,500 or more birds.*

- *In Oklahoma, the state lead agency is working toward getting federal NPDES "delegation" for its CAFO program, so currently the state has a dual federal and state regulatory system. There are 182 CAFOs with EPA NPDES permits, 305 state licensed CAFOs and 857 registered poultry feeding operations. The Oklahoma Department of Agriculture, Food and Forestry is the regulating agency overseeing these operations.*
- *In Iowa, state law is much more stringent than federal law. Further, open feedlots with more than 1,000 animal units are required to have NPDES permits. Iowa Department of Natural Resources data shows there are 4,085 "registered" CAFOs and half of those have more than 1,000 animal units.*

It is Farm Bureau's understanding that EPA believes the discharge of phosphorus is theoretically minimal, to non existent, from the production areas and minimal even from the land application areas, so long as operations are complying with state and federal guidelines of site-appropriate application practices. There is no discharge level in federal permitting per se; rather operational and best management practices are specified as conditions of the permits.

8. As a result of a citizen suit under CERCLA or EPCRA, has an animal feeding operation ever paid a penalty for failure to report releases above the reportable quantity limits? If so, please provide the amount of the penalties and the name of the case.

   Several cases have included CERCLA and EPCRA claims against agricultural operations. Cases are most often filed against integrators, but in all instances, animal and poultry producers who contract with that company are directly or indirectly impacted by these negative court precedents. A sampling of the cases where penalties, monetary damages or economic settlements were paid includes the following (other cases may exist):

   - *Premium Standard Farms and Continental Grain Co., Inc. – Citizen suit brought in the Western District of Missouri by Citizen's Legal Environmental Action Network ("CLEAN") alleging violations of reporting requirements under EPCRA and CERCLA. The United States intervened in this litigation. A settlement with EPA and Department of Justice was announced on Nov. 19, 2001, with PSF paying $1 million in total penalties to EPA and the state of Missouri, and requiring PSF to implement a supplemental environmental project with an estimated value of $300,000. Separate litigation and a private settlement addressed CLEAN's attorneys' fees claim.*

- *Seaboard Farms, Inc. – Citizen suit brought in the Western District of Oklahoma by the Sierra Club for violations of CERCLA reporting requirements for ammonia emissions. Complaint demanded $25,000 in penalties. CERCLA claim was settled for an unknown amount. At this time, we do not know the resolution of the Sierra Club's attorneys' fees claim.*
- *Tyson Foods, Inc. – Citizen suit brought in the Western District of Kentucky by Sierra Club alleging violations of reporting requirements under CERCLA and EPCRA. After a preliminary district court ruling that Tyson was liable under CERCLA and EPCRA for failing to report ammonia releases from poultry farms, the parties entered into a consent decree in which Tyson agreed to certain injunctive relief, including mitigating ammonia releases and studying emissions from its facilities. At this time, we do not know the resolution of the Sierra Club's attorneys' fees claim.*

The Honorable Paul E. Gillmor

1. From your written statement, you state that there is a greater need for public health scrutiny due to the risks associated with mad cow disease. If I understand this correctly, excess and waste from cattle slaughterhouses are included in poultry feed. Poultry waste, or litter including feces and feathers, in turn, is used in cattle feed. What is the likelihood of the disease transferring from cows, through chickens and back to cows again?

   Yes, waste from cattle slaughterhouses is included in poultry feed and poultry litter is in turn used as a component of cattle feed. Unfortunately, at this time, it is very difficult to estimate the likelihood of BSE transferring to cows through this exposure pathway because we do not have an adequate surveillance system in place to test cattle slaughterhouse waste (especially brain, spinal cord, and other nervous tissue), poultry litter and cows destined for human consumption) for prions, the causative agent of BSE. Much remains unknown about the biology, infectivity, latency period, and other aspects of prion action to cause BSE. What is known is that the infection is only spread by having animals (including humans) consume infected tissue of other animals. Stricter surveillance and testing of cattle at slaughter and ending the practice of feeding animals parts or excreta to other animals would reduce the risk of BSE.

2. You state that there are significant amounts of airborne emissions resulting from CAFOs, and one of the compounds you list is methane, a natural biological byproduct of many species. I am curious if you have a solution to dealing with the methane releases from pigs, cows, horses and the like. How would you control these emissions? What would you do with the collected gas?

   Given your statement that methane is a natural biological product of many species, the best way to "control" the emissions is to prevent them from occurring in a concentrated fashion. From a public health perspective, new technologies for handling methane gas are not the answer. We should first be aiming for source reduction. Raising food animals using more sustainable methods and in lower concentrations is an important approach to source reduction.

3. I am curious about an apparent discrepancy in your work. In the May 2002 issue of *Environmental Health Perspectives*, you and your co-authors write that "animals in the U.S. meat industry produced 1.4 billion tons of waste." Less than two years later, you and a co-author write in the winter 2004 issue of the *Yale Journal of Health Policy, Law, and Ethics* that "The total amount of animal manure produced annually in the United States is 12.4 billion tons." With such a jump as that, it seems like one of those numbers is seriously wrong. Can you explain the discrepancy in those two numbers?

   You have identified a discrepancy in the data that reflects a reference mistake within the book (Slaughterhouse Blues) that was the subject of the book review I wrote for the Yale Journal of Health Policy, Law, and Ethics. The 12.4 billion tons of waste referred to in the book appears to have been an error, perhaps a typographical mistake, in recording data from the original paper referred to by the authors of Slaughterhouse Blues. The original reference is consistent with the number used in the EHP report and can be found in:

"Meat Factories - pollutants from meat factories", Sierra, January 1999, by Ken Silverstein. The number 12.4 clearly seems to be a typo. The article clearly states that 1.4 billion tons of animal manure are generated each year, and the authors of Slaughterhouse Blues use the 12.4 billion figure. See the excerpt from the article below.

"The situation in North Carolina is part of a growing nationwide crisis: farms have now replaced factories as the biggest polluters of America's waterways. A December 1997 report prepared for Iowa Senator Tom Harkin (D), who sits on the Senate Committee on Agriculture, says that animal waste is the largest contributor to pollution in 60 percent of the rivers and streams classified as "impaired" by the Environmental Protection Agency. According to the same report, the United States generates 1.4 billion tons of animal manure every year--130 times more than the annual production of human waste. Cattle manure leads the list at 1.2 billion tons, followed by pig manure at 116 million tons, and chicken manure at 14 million tons."

It is important to point out that estimates are necessary because there is no rigorous surveillance system in place in the US that collects data on the amount of animal waste produced per year.

The Honorable Heather Wilson

1. Mr. Lawrence, I understand that in the May 2002 issue of *Environmental Health Perspectives* you supported the use of organic fertilizer, including manure, over the use of chemical fertilizers. If Superfund liability is applied to animal agriculture operations, most producers indicate they will no longer sell their manure for cropland application, since they would be financially liable for actions on farms over which they have no control. It seems this would have two immediate effects: a dramatic increase in the use of chemical fertilizer, which is expressly exempt from Superfund liability, and an extreme shortage of organic fertilizer to support the rapidly growing organic farming industry. How do you reconcile your support of curtailing animal production with these two outcomes?

I agree that we need to develop practices that will foster the use of animal manure over chemical fertilizers. We must ensure, however, that the application of waste is done at sustainable rates. The argument that animal agriculture operations will no longer sell their manure for cropland application due to superfund liability is based on an overly simplistic and false view. There is no evidence to support this statement. Superfund liability is applied in extreme situations and is a safeguard for individuals from the improper application of animal waste by large operations. Land application is the "cheapest way" for producers to get rid of the large quantities of manure generated by CAFOs. Producers are certainly not making any money from its application but are rather attempting to solve a disposal problem. Current CAFO practices are associated with lax waste disposal practices and can lead to "too much of a good thing," with animal waste applied on fields during the non-growing season, excess quantities applied during the growing season beyond the capacity of crops to take up all of the nutrients, and run-off from field applications leading to eutrophication of waterways, algal blooms, fish kills, and contamination of drinking supplies. The problem is concentration. Properly used and applied in appropriate concentrations on agricultural land, animal waste can be an effective and sustainable method of enriching nutrient-depleted soils

The Honorable Ralph M. Hall

1. Your testimony calls livestock operations a breeding ground for avian flu. Are you aware of any published, peer reviewed studies that claim that U.S. poultry producers are breeding or spreading avian flu? Have you personally done any studies specifically on avian flu and U.S. poultry operations? Where do you derive the authority and basis to make such a statement?

   First, by using the term "breeding ground," I do not mean to imply that anyone is purposefully breeding or spreading avian flu. Rather, the experience in Hong Kong and Western Europe indicates that the conditions of high intensity poultry production are recognized risk factors for the evolution of highly pathogenic avian influenza, including H5N1 that is transmissible to humans and that poultry farmers and workers are among the highest risk groups for infection by these viruses, as recently shown in the Netherlands. Asian viruses have been detected in wild birds in the US, including on the Delmarva Peninsula. Fortunately, high pathogenicity avian influenza (or HPAI as referred to by the USDA) has not affected US poultry flocks to date; thus, there are currently no published, peer-reviewed studies that have investigated US poultry flocks as a source of avian influenza during the period from 2003 to the present when outbreaks have been reported in several East Asian countries.

   Due to the high concentration, density and volume of US poultry flocks, however, it is likely that if an HPAI outbreak were to occur in the US, it could spread quickly among and between flocks because (in the words of the USDA) the virus is "primarily spread by direct contact between healthy birds and infected birds, and through indirect contact with contaminated equipment and materials. The virus is excreted through the feces of infected birds and through secretions from the nose, mouth and eyes... Within a poultry house, transfer of the HPAI virus between birds can also occur via airborne secretions. The spread of avian influenza between poultry premises almost always follows the movement of contaminated people and equipment." It is because this virus spreads so rapidly among and between poultry operations that each time it has been detected in East Asian countries, millions of chickens and other poultry species have been culled in the area of the outbreak to prevent any further dissemination of the virus. Note that as of November 18, 2005, nearly one million birds had been culled throughout China to prevent the spread of the virus.

   I have not personally conducted studies specifically on avian flu and US poultry operations and, to my knowledge, neither has Dr. Julie Gerberding, the director of the Centers for Disease Control and Prevention. This does not preclude either of us, or any other public health professional for that matter, from using our knowledge regarding the epidemiology of disease outbreaks and human health from discussing and preparing for a possible avian flu outbreak that could occur in the US. You may find additional information supporting my testimony and comments here at the USDA website:
   http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2005/10/0458.xml

2. Do you believe that when EPA listed a substance on the hazardous substance list, like phosphorous; it thereby intended to include all chemical compounds that contain that substance? Why?

No. Specific chemical compounds are listed on the hazardous substance list because they are 1) commonly found at National Priority List (NPL) sites and 2) because they are (in the words of the Agency for Toxic Substances and Disease Registry) "determined to pose the most significant potential threat to human health due to their known or suspected toxicity and potential for human exposure at these NPL sites."

On the 2005 CERCLA Priority List of Hazardous Substances, phosphorus, in the specific form of white phosphorous, is listed, indicating that this particular form of phosphorous currently poses a significant threat to human health as a result of its presence at NPL sites. The hazardous substance list is a dynamic compilation of toxic compounds that is updated each year. Therefore, it is not unreasonable that at some point in the future another phosphorous-based compound or compounds could appear on this list if it/they are found to pose significant threats to human health.

3. In your testimony, you cite several studies that document the health affects on nearby neighbors of swine facilities and postulate that the effects of large-scale poultry operations on the health of nearby neighbors would be similar, since these facilities emit many of the same pollutants. Isn't it correct that there have been no published studies that investigate these effects for poultry facilities? Although these facilities may emit many of the same airborne contaminants, they certainly do not do so in equal amounts, there is no way a chicken generates the same amount of waste as a fully grown hog, right? Would this difference in emission concentration be evident in the difference in health effects? What would those differences be?

Yes, there are currently no published studies that have investigated the community health effects associated with poultry facilities. The absence of data, however, does not translate to an absence of potential health effects. For example, when there were no studies that described the relationship between smoking and lung cancer, it did not mean that the relationship between the two did not exist. It merely meant that this research had not been conducted yet. The absence of data regarding the community health effects associated with poultry facilities simply reflects the fact that it difficult for researchers to gain access to such facilities and communities for subsequent research studies.

You correctly point out that a chicken does not generate the same amount of waste as a fully grown hog. However, there are approximately 28,000 - 40,000 chickens present in an average poultry house, while there are approximately 3,000 hogs present in an average hog house. Thus, it is possible that emissions from these differing numbers of animals are the same order of magnitude (of course it would depend on the number of houses present at each type of facility). For example, two poultry houses with flocks of 30,000 broilers each whose market weight is 5 pounds/broiler constitutes a biomass of 300,000 pounds while a hog CAFO with 3,000 animals weighing 250 pounds each would constitute a biomass of 750,000 pounds. Both types of CAFOs would produce large amounts of ammonia.

Furthermore, the U.S. produces 8.7 billion chickens annually in contrast to 0.1 billion hogs. Broiler poultry production results in more than 12 million tons of poultry litter (consisting of excreta, animal carcasses, feathers, spilled feed, soil and bedding *material). Peer-reviewed research has documented substantial ammonia emissions from commercial chicken houses on the Delmarva Peninsula (*18.2×10^6 *kg of* NH_3*-N* yr^{-1}*). Additionally, Roxarsone, an organo-arsenical, is currently used as a feed additive in the diets of chickens and swine to improve growth, feed efficiency and to prevent coccidial infections. The compound is excreted in animal waste and degrades to arsenite and arsenate (leachable forms of arsenic). Levels of arsenic in poultry litter have been found to range from 11.1 to 36.2 mg/kg of waste, and the US Geological Survey (USGS) has calculated, based on arsenic concentrations measured in poultry waste, that between 250,000 and 350,000 kilograms of arsenic (from poultry feed additives) is applied annually to land in the U.S. The finding that arsenate is a degradation product from Roxarsone is important because arsenate is one of the two inorganic forms of arsenic commonly found in drinking water and associated with cancer. Unfortunately, public health surveillance systems have not been put in place to quantify the health effects of emissions from poultry production facilities.*

4. Dr. Lawrence, you are the director of the Center for a Livable Future, CLF, is that correct? Isn't it true that the CLF has aggressively endorsed a campaign called Meatless Mondays? Doesn't this campaign encourage a vegetarian-only lifestyle, and rails against the effects of large-scale livestock production in order to further this lifestyle? Wouldn't oppressive regulation of the livestock business be in your interest, regardless of the regulatory viability of these regulations or the public health benefit?

   Yes, I am the Director of the Johns Hopkins Center for a Livable Future.

   Your description of the Meatless Monday Campaign is inaccurate. The growing per capita consumption of meat and saturated fats is taking a toll on human health. Scientific research consistently supports recommendations to eat less meat, saturated fat, and refined sugars in favor of healthy plant-based alternatives. Adopting this dietary pattern can help prevent heart disease, stroke, diabetes, obesity and some cancers. As the scientific advisors to the Meatless Monday Campaign, Inc., CLF supports the campaign as the primary source for health and nutrition information and provides support for pilot research projects evaluating the effectiveness of campaign strategies and messages. The campaign promotes healthy food choices and encourages people to reduce consumption of meat one day per week (and saturated fat) to help combat chronic disease. This is consistent with USDA recommendations of the US Dept. of Health and Human Services and the American Heart Association. The DHHS publication, Healthy People 2010, called for a reduction of dietary saturated fat in the average American diet of 15% by 2010. Avoiding meat and animal products one day per week would help many people achieve this goal, hence "Meatless Monday."

5. You make extensive recommendations in your writings for changing farming and ranching practices in the United States. Do you hold any agriculture-related degrees or have any personal experience raising food for widespread consumption? Do you have any way to personally assure this committee that your proposals actually would work, or are your conclusions based solely on other people's written materials?

My education and training have been in medicine and public health. I have provided testimony from a public health perspective and believe that one does not need a degree in agriculture or experience in farming to know about the harms to public health caused by chemical and biological contaminants that are emitted into the environment from industrial animal production facilities. For this, one needs to know about human health, which is my area of expertise, and it is from this point of view that I have provided testimony.

I do not understand what specific "proposals" you are referring to in your question, but if you are asking me whether I support the adoption of agricultural practices that are sensitive to the environment and the public's health, I do. Current industrial animal production practices produce artificially cheap meat for the American public because the "externalities" of environmental degradation, loss of biodiversity, and impacts on human health of a diet high in saturated fats are not capture in the price of the product. I believe that substantial amounts of data are available to support the conclusions and recommendations I have included in my writings.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. What acute and/or chronic illnesses could occur as a result of exposures to "hazardous substances" (i.e. arsenic, antibiotic resistant bacteria, hydrogen sulfide, etc.) found in either animal waste emissions or airborne emissions from industrial animal production operations, and what is the total economic burden of these illnesses on the U.S. healthcare system?

   Antibiotic resistance is an increasing problem in the US and around the world. Strains of bacteria resistant to nearly all known antibiotic therapies have begun to proliferate. The public health consequences of antibiotic resistance are evident—in the US, thousands die annually from antibiotic-resistant infections, and the excess cost of treating patients with these infections is estimated to be in the billions. While some of these bacteria are hospital-acquired (nosocomial) strains, researchers have also begun to see an increase in community-acquired antibiotic-resistant infections. The sources of these community-acquired strains are often unknown; however, it is suspected that many come from industrial animal production, where billions of animals are fed antibiotics annually. Of the 27 million pounds of antibiotics produced annually in the US, 3 million are used to treat infections in humans and 24 million pounds are used in animal production, mostly in the form of sub-therapeutic doses intended for "growth promotion." Providing sub-therapeutic doses of antibiotics to animals living in close confinement creates the perfect situation for selecting out bacteria carrying antibiotic resistance genes while killing off the susceptible bacteria.

   Acute health effects associated with high-level arsenic exposures include neurological manifestations such as peripheral neuropathy, hematological abnormalities, renal failure, respiratory failure, and pulmonary edema.

   Chronic arsenic exposures are strongly associated with cancers of the skin, lung and bladder, and these exposures have been associated with an increased risk of cardiovascular disease, peripheral vascular disease, respiratory disease, diabetes mellitus, and neutropenia.

   I do not believe that any of the aforementioned acute health effects associated with high level arsenic exposures will be observed as a result of animal waste management practices, but some current research is focused on investigating the carcinogenic risks associated with exposure to arsenic from animal waste.

   In terms of airborne emissions, little is known about airborne arsenic emissions resulting from animal waste incinerators. Incineration of wastes is a relatively new waste management strategy, and concentrations of arsenic in the emissions from these incinerators have not been determined. A good source of information on health effects of acute and chronic arsenic toxicity is available in: Ratnaike, Postgrad Med J. 2003 Jul;79(933):391-6.

   The following table, provided by Jay Graham, a doctoral student and fellow of the Center for a Livable Future, summarizes the human diseases associated with animal waste contamination.

Table 1. Outbreaks and cases of gastrointestinal illness associated with water contaminated by animal waste.

Location	Pathogen	Impact	Suspected Source
United States			
Washington Co. NY	*E. coli* O157:H7 & *Campylobacter*	2 deaths, 700 cases	Manure runoff from fairgrounds (44)
Carrollton, GA	*Cryptosporidium Parvum*	13,000 cases	Manure runoff (45)
Other Countries			
Walkerton, Canada	*E. coli* O157:H7 & *Campylobacter*	6 deaths, 2,300 cases	Runoff from farm fields entering water supply (46)
Swindon & Oxfordshire, UK	*Cryptosporidium Parvum*	516 cases	Runoff from farm fields (47)
Bradford, UK	*Cryptosporidium Parvum*	125 cases	Runoff from farm fields (48)
Swaziland	*E. coli* O157:H7	40,912 cases	Runoff from livestock entering water supply (49)

2. Why do you think agricultural operations should be held accountable like other industries with regard to the Comprehensive Environmental Response, Compensation, and Liability Act?

   From a public health perspective –any industry that adversely impacts the health of the public should be responsible for its management of hazardous materials, waste products, ecosystem effects, and impacts on property values and held accountable for compensating those injured as a consequence of improper risk management practices.

3. We are increasingly conscious of the threat of epidemic influenza originating from avian sources because of continuous discussion in the media and by scientific and medical experts worldwide. As a public health practitioner, what do you consider a prudent public health policy regarding the potential risks of our current methods of food animal production in the context of heightened concerns over the transfers of animal diseases, including avian flu?

Please see my response to Congressman Hall for details about high pathogenicity avian influenza (HPAI). A prudent policy in the short term would be heightened surveillance of the flocks, workers, and neighboring community members for the first signs of epidemic influenza. Protocols should be developed and universally adopted for removing contaminated clothing before departing from the poultry facility before returning to the community or home setting and sampling poultry during transport, slaughter and processing for presence of avian influenza virus. In the long term the industry needs to adopt poultry production practices that provide a safer environment and removes the "Petri dish" environment of current confinement facilities.

The Honorable Paul E. Gillmor

1. Under Section 122(g)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), there are certain parameters that shield a potentially responsible party (PRP) from either going into bankruptcy or being put out of business due to a CERCLA action. Since CERCLA Section 122(g)(7) only relates to actions taken by the Federal government against the PRP, I do not read this bankruptcy protection as existent for suits brought under CERCLA Section 310, which allows citizen suit actions. Therefore, someone could, in fact, use the threat if not the actual pursuing of a Section 310 action to drive a person into severe economic hardship. Do you disagree with this reading any why?

   Answer: Section 122(g)(7) does not shield PRPs from bankruptcy. Rather, it gives EPA the discretion to reduce response costs in settlements with a party only if the amount of hazardous substances contributed by the party is de minimus and if certain other conditions are met. Section 310 of CERCLA does not allow citizens to recover response or remedial costs under section 107, natural resources damages under section 107 or injunctive relief under section 106. Citizens can bring claims under section 310 against large agribusinesses for failure to report releases of toxic chemicals, like ammonia, that exceed regulatory thresholds. In both cases where this has happened, the defendants did not pay a single penny in penalties. Even if the citizens had asked a court to assess a penalty, courts generally take into account the nature, circumstances, extent and gravity of the violation(s), *as well as the defendant's ability to pay*, any prior history of violations, the degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice requires. Furthermore, any assessed penalty would go to Treasury and not to citizens. Finally, the requirement to report the releases of toxic chemicals itself is not burdensome and would never drive a CAFO into severe economic hardship.

2. Also, since CERCLA Section 122(g) (7) protects a person's basic business model, would you consider a Federally-led CERCLA suit against someone (PRP) who was a legally defined CAFO under the Clean Water Act, to result in the PRP being able to continue as a legally defined CAFO, continued operation as a smaller, but legally defined AFO (animal feeding operation), or not at all?

   Answer: I do not understand this question.

3. In your testimony, you state that you "support maintaining authority under CERCLA to require livestock operations to cleanup their unpermitted releases of hazardous waste to the environment." As I understand it, under the Clean Water Act, the smaller animal feeding operations are the ones not subject to permitting requirements. Does this mean you support smaller farms being required to comply with all CERCLA response requirements for field application or storage of their manure?

   Answer: The intent of my testimony was to emphasize that "CERCLA . . . imposes the costs of the cleanup on those responsible for the contamination." Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989). There have been only three cases against CAFOs that include cost recovery claims. The city governments of Waco, TX and Tulsa, OK brought actions to protect public drinking water supplies from phosphorous pollution related to dairies and poultry operations. The State of Oklahoma brought the third case to recover response costs and natural resource damages for the destruction of fish and wildlife, and for the contamination of groundwater and drinking water supplies from improper poultry waste disposal. These actions seek to ensure that those responsible for causing pollution of critical water supplies---not downstream drinking water utilities or taxpayers—assume responsibility for damage that they cause. The vast majority of smaller operations will likely never release hazardous substances at levels that would inspire a response or remedial action.

4. As I understand the law, the government pays for response actions that are either an imminent threat or where in non-emergency situations the responsible party is unwilling, unable, or unavailable to pay for the costs. In the non-emergent situations, the government can seek recovery against a solvent, yet unwilling party. Your testimony mentions that the government should first cleanup an NCP site and then seek contribution from the PRP for remediation costs. Wouldn't a government-first approach contravene the objective making the polluter responsible for their mess first and make litigation a more important consideration than cleanup?

   Answer: My testimony did not state that the government should first clean-up a site; it only mentioned that the government has the option to respond to a release of a hazardous substance under section 104 of CERCLA. The federal government has two options for clean up under CERCLA. The Federal Government may clean up a contaminated area itself under section 104, or it may compel responsible parties to perform the cleanup under section 106. See also Key Tronic Corp. v. United States, 511 U.S. 809, 814, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994). In either case, the Government may recover its response costs under section 107, the "cost recovery" section of CERCLA. Therefore, a government-first approach does not contravene the polluter pays principle. I also do not understand how taking a polluter to court to compel cleanup, instead of cleaning up first and then seeking recovery of damages, would somehow result in less litigation, as your question implies.

5. How do you compare bio-solid sewage sludge application from fields, a sanctioned activity by EPA that is a permitted activity that would be exempt under CERCLA to animal manure application on farm fields at a CAFO?

   Answer: CERCLA provides exemptions for federally permitted *releases* not for activities. Any release that meets the definition of "federally permitted release" under section 101(10) of CERCLA is exempt from CERCLA liability. If an applicator of bio-solid sewage sludge or an applicator of manure had a federal permit that authorized releases of hazardous substances, the federally permitted releases would be exempt from CERCLA.

6. Ms. Merkel, you state in your testimony that without these statutes, meaning CERCLA and EPCRA, the government is powerless to protect critical natural resources like public drinking water supplies, and the public is exposed to potentially dangerous quantities of hazardous pollutants. Does this mean you discount several tools for the government to use, on both a state and federal level to protect critical natural resources, including the Clean Water Act, RCRA, Safe Drinking Water Act Section 1431, common law nuisance claims, state zoning ordinances, and other civil penalties? Do you not agree that these laws could also be applied?

Answer: I do not discount other laws that are available for state and federal governments to use to protect critical natural resources from agricultural pollution. The intent of my testimony was to emphasize that CERCLA and EPCRA fill critical gaps where other laws fail to protect the public health and the environment from releases of hazardous substances. The other laws you mentioned cannot be applied in the same way as CERCLA. For example, RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. CERCLA was passed several years after RCRA went into effect. Although CERCLA is designed to address many of the same toxic waste problems that inspired the passage of RCRA, CERCLA differs markedly from RCRA in the remedies it provides. Meghrig v. Kfc W., 516 U.S. 479 (1996). Unlike CERCLA, RCRA does not allow the recovery of response costs for remediation of environmental hazards like those presented in the City of Waco and Oklahoma cases.

The other laws you mention, including the Clean Water Act, Safe Drinking Water Act Section 1431, common law nuisance claims and state zoning ordinances also do not provide the same clean-up authority as CERCLA. Thus, CERCLA is the only statute that allows cities like Waco and Tulsa and states like Oklahoma to clean-up and recover response costs where there has been contamination of a public drinking water supply.

In addition to providing different remedies, CERCLA regulates a broader range of hazardous pollutants. For example, the Clean Air Act does not regulate ammonia or hydrogen sulfide as hazardous air pollutants. Congress intended CERCLA to augment, not supplant, other federal statutes that fail to address hazardous substances. Section 102 of CERCLA specifically authorizes EPA to designate substances as hazardous that are not regulated under other federal statutes if "when released to the environment [they] present a substantial danger to public health, welfare or the environment.

The Honorable Charles F. Bass

1. I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?

   Answer: Releases of contaminants from animal feedlots that are permitted under the Clean Air Act or the Clean Water Act are exempt from CERCLA and EPCRA requirements. However, CERCLA and EPCRA fill critical gaps where other laws fail to protect the public health and the environment from releases of hazardous substances. The Clean Air Act and Clean Water Act differ markedly from CERCLA in the remedies that they provide, because they are not designed to effectuate the cleanup of toxic waste or to compensate those who have remediated environmental hazards. Thus, CERCLA is the only statute that allows cities like Waco and Tulsa and states like Oklahoma to clean-up and recover response costs where there has been contamination of a public drinking water supply.

   In addition to providing different remedies, CERCLA regulates a broader range of hazardous pollutants. For example, the Clean Air Act does not regulate ammonia or hydrogen sulfide as hazardous air pollutants. Congress intended CERCLA to augment, not supplant, other federal statutes that fail to address hazardous substances. Section 102 of CERCLA specifically authorizes EPA to designate substances like ammonia and hydrogen sulfide that are not regulated under other federal statutes as hazardous if "when released to the environment [they] present a substantial danger to public health, welfare or the environment."

   There has never been a CAA permit issued to a dairy, although some dairies may have CWA permits. CWA permits are not comprehensive enough to protect nearby communities from all hazardous releases however. Dairies can be large emitters of hazardous air pollutants like ammonia. For example, Threemile Canyon Farms in Boardman, Oregon, reported that its 52,300 dairy cow operation emits 15,500 pounds of ammonia per day, more than 5,675,000 pounds per year. That is 75,000 pounds more than the nation's number one manufacturing source of ammonia air pollution (CF Industries of Donaldson, Louisiana). A Clean Water Act permit would not address these releases.

   Finally, all other industries that release hazardous substances have to comply with multiple environmental statutes. There is no reasoned basis to treat dairies differently, particularly when dairies like Threemile Canyon release more toxic chemicals than any other manufacturing source in the nation. Ammonia releases from dairies are just as dangerous to human health and the environment as ammonia releases from other industries.

2. The funding levels for the Environmental Quality Incentives Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79million in EQIP funds but already has a backlog of $1.41million in requests for projects it can't fund. With the uncertainty of agriculture

programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my questions is without a substantial increase in this program will producers be able to get their operations in compliance?

Answer: The Sustainable Agriculture Coalition and some of the other groups that signed on to the my testimony ("Coalition") agree that dairy producers such as the vast majority of those in New Hampshire should get a larger share of EQIP dollars for its small and mid-sized dairies. During the 2002 Farm Bill debates, the Coalition called for the retention in EQIP of a prohibition on funding of waste infrastructures for large-scale CAFOs, including massive waste lagoons. They also called for a stricter EQIP payment limit so that more funds would be available to small and mid-sized operations, rather than having huge EQIP payments going to large-scale CAFOs. Recently, they called for a national priority in EQIP for livestock farmers, including dairy farmers, who graze their animals and use forages from their own land fertilized with animal manures in balanced nutrient systems. The establishment of this national priority could allow the allocation of more EQIP funds to states like New Hampshire, with many small and mid-sized dairies on a land base sufficient for environmentally sound use of their dairy manure.

There are other USDA conservation programs with cost-share and incentives that could help all New Hampshire farmers including dairy farmers. The Conservation Security Program is ideally suited to farmers with integrated crop and animal farming systems, especially those who are addressing environmental and natural resources problems in a comprehensive fashion.

New Hampshire is also ideally located for the growing organic milk sector, especially with the establishment of a new organic dairy farm for research, education and outreach at the University of New Hampshire. In addition to USDA's organic transition funding, the Organic Valley Cooperative has also offered incentive payments for New Hampshire dairy farmers making the transition to organic. The Sustainable Agriculture Coalition and others also advocate for increased attention to organic research at USDA and the Land Grant Universities on organic crops and forages for use as animal feed.

The Coalition has also called for more attention to the credit and conservation needs of beginning farmers, including the increased cost-share rates for beginning farmers in EQIP and the new land sales contract program for beginning farmers under which FSA provides a payment guarantee for two years for land sales contracts between landowners and beginning farmers. The Coalition's overall goal is to make linkages among USDA programs that will help new farmers begin with farming with incentives for good conservation practices in sustainable agriculture systems. Please contact us if you would like further information on these programs.

The Honorable Ralph M. Hall

1. I noticed that your written testimony portrayed animal agriculture as an industrial complex operated by wealthy companies that no longer included smaller operators. Your written testimony focuses on the revenue streams of these large agri-businesses and mentions their contractors, who operate on a contract basis with the larger "integrator" only in passing. Do you consider these contract producers who depend on the larger companies to be wealthy agri-businesses that should have full CERCLA liability on them? Don't you expect that if someone sued the larger "integrator" that they would in turn sue these smaller producers and sever there contracts with them? If not, what in Superfund's 25 year history gives you confidence that this will not happen?

   Answer: The intent of my testimony was to emphasize that large industrial production facilities are the operations that have jeopardized public health by releasing hazardous substances above regulatory thresholds into the air and by contaminating public drinking water supplies. These operations should be responsible for cleaning up, and paying for, the harmful conditions that they create. Section 113(f) of CERCLA does allow any person to seek contribution from other persons who are liable or potentially liable under section 107; however, there is no guarantee of recovery and each person is only liable for their equitable share. The equitable share of contract operators is likely to be very small, if any, because large integrated operations occupy positions of responsibility and power over their contract growers, direct the activities that often result in pollution, and have the capacity to prevent environmental damage. Large operations cannot hide behind their contract operators to avoid CERCLA liability. See Sierra Club v. Tyson Foods, et al, 299 F. Supp. 2d 693 (W.D.Ky. 2003).

2. You state that ammonia is a human toxin that EPA lists alongside arsenic, cyanide, and benzene as a hazardous substance under CERCLA. You state that the livestock sector produces roughly 73% of all ammonia emissions nationwide. You also state that some of the largest facilities produce staggering quantities of ammonia gas—comparable to pollution from the nation's largest manufacturing plants. Can you please state how this ammonia is regulated under the CWA and other environmental laws?

   Answer: Any releases that are permitted under the Clean Water and Clean Air Act are exempt from the requirements under CERCLA. But Congress enacted CERCLA precisely because it recognized that some hazardous substances that were not regulated could present a serious risk to human health or the environment. Ammonia is not regulated as hazardous pollutant under the Clean Air Act. The Clean Water Act also does not regulate ammonia air emissions, even though livestock operations that are subject to Clean Water Act permits routinely release ammonia For example, 53% of nitrogen from swine CAFOs is lost as ammonia from housing and production areas. See U.S. EPA, *National Emission Inventory—Ammonia Emissions from Animal Husbandry Operations, Draft Report* (January 30, 2004), at Table E-2.

Because permitting statues do not adequately regulate ammonia, CERCLA is necessary to protect human health and the environment. Congress intended CERCLA to augment, not supplant, other federal statutes that fail to address hazardous substances. Section 102 of CERCLA specifically authorizes EPA to designates substances as hazardous that are not regulated under other federal statutes if, "when released to the environment [they] present a substantial danger to public health, welfare or the environment." Ammonia presents substantial danger to public health and the environment. Human exposure to ammonia triggers respiratory problems, causes nasal and eye irritation, and in extreme cases is fatal. For this reason, the American Public Health Association, the Michigan State Medical Society, the Canadian Medical Association, as well as local boards of health have all called for moratoria on new CAFO construction.

3. Is there any evidence that, when Congress enacted CERCLA in 1980 or the Superfund Amendments and Reauthorization Act in 1986, Congress intended CERCLA to apply as Oklahoma, the City of Waco, and others seek to have it applied? What evidence? Has Congress or EPA studied whether CERCLA should be applied in this matter? If not, shouldn't it ultimately be up to Congress to make the decision?

Answer: Yes, when Congress enacted CERCLA in 1980 or the Superfund Amendments and Reauthorization Act in 1986, Congress intended CERCLA to apply broadly. CERCLA, which was enacted "in 1980… in response to the serious environmental and health risks posed by industrial pollution," must be interpreted liberally so as to accomplish its remedial goals. United States v. Bestfoods, 524 U.S. 51, 55 (1998); Dedham Water Co. v. Cumberland Farms Diary, Inc., 805 F.2d 1074, 1082 (1st Cir. 1986) ("CERCLA is essentially a remedial statute designed by congress to protect and preserve public health and the environment, courts are obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.") "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." Key Tronic Corp. v. United States, 511 U.S. 809, 814, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994). CERCLA imposes the costs of the cleanup on those responsible for the contamination. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." Id., at 21.

There is evidence that Congress intended CERCLA to specifically apply to agriculture. Congress declined to exempt manure from the definition of hazardous substance as it did with natural gas and petroleum. 42 U.S.C. § 101(14). Rather, Congress excluded the "normal application of fertilizer" from the definition of release. 42 U.S.C. § 101(22). There is legislative history that explains what this term means: "The term "normal field application" means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops." S. Rep. No. 96-848, at 46 (1980).

The State of Oklahoma and the City of Waco have applied CERCLA in the way that Congress intended. In both cases, the governments brought actions to protect the public's drinking water supplies from hazardous pollution released from dairy and poultry operations. The governments allege that these operations released hazardous substances to drinking water supplies by dumping manure on land in significantly greater concentrations or amounts than are beneficial to crops. These cost recovery actions seek to ensure that those responsible for causing pollution of water supplies – not downstream drinking water utilities and their customers – assume responsibility for damage they have caused. CERCLA appropriately provides governments like the City of Waco and State of Oklahoma with the legal tools to uphold the principle that polluters should pay for damages and cleanup.

4. Are homeowners liable if they set their spreader on the wrong setting when fertilizing their lawns? Golf courses? Nurseries? What about developers? Should runoff from development locations that contains nutrients give rise to CERCLA liability?

Answer: There are endless theoretical possibilities about what industries may release hazardous substances in quantities that trigger a reporting requirement or inspire a response action under CERCLA. There is a reason these theoretical possibilities do not materialize in practice – the examples you cite are extremely unlikely to release hazardous materials in the kinds of quantities that would trigger reporting requirements or lead to liability. In contrast, air and water pollution from large animal feeding operations is well documented. A large CAFO, for example, generates as much untreated biological waste as a large municipality. While municipalities have to treat their waste, most CAFOs do not yet have permits that require treatment or impose discharge limits. To the extent that they do, they do not face CERCLA liability, which does not apply to federally permitted releases.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. Are you aware of concentrated animal feeding operations (CAFOs) that have been able to measure or estimate their emissions? If so, can you please describe the results?

Answer: I am aware of a number of CAFOs that have estimated or measured their emissions. All of them have reported ammonia emissions at levels that well exceed the reporting threshold of 100 pounds per day under CERCLA:

- Threemile Canyon Farms in Boardman, Oregon, reported that its 52,300 dairy cow operation emits 15,500 pounds of ammonia per day, more than 5,675,000 pounds per year.[1] That is 75,000 pounds more than the nation's number one manufacturing source of ammonia air pollution (CF Industries of Donaldson, Louisiana).[2]

- Desert Rose Dairy, a 8750 head dairy in Idaho, reported ammonia emissions of 710 pounds per day, more than seven times above the reporting threshold under CERCLA.

- Seaboard Farms, a swine operation in Oklahoma, estimates that the total average daily emissions of ammonia from its Dorman Sow Facility is 192 pounds per day, almost double the 100 pound per day reporting threshold under CERCLA.

- Buckeye Egg Farm's facility in Croton, Ohio reported ammonia emissions of over 4,300 pounds per day – 43 times the reporting threshold under CERCLA and EPCRA.[3]

- Recent measurements taken pursuant to the settlement agreement reveal that PSF releases 3 million pounds of ammonia annually (8,219.2 lbs per day) from the cluster of barns and lagoons at its Somerset facility.[4] These emissions make PSF the fifth largest industrial emitter of ammonia in the United States. This data does not include the ammonia gases released when liquid manure is sprayed on the company's nearby fields.

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[1] Letter from Tom Lindley on behalf of Threemile Canyon Farms to EPA Region X, April 18, 2005.

[2] U.S. EPA, Toxics Release Inventory, 2003. Search performed at: < http://www.epa.gov/triexplorer/>.

[3] U.S. Department of Justice, *Ohio's Largest Egg Producer Agrees to Dramatic Air Pollution Reductions from Three Giant Facilities*, http://www.usdoj/opa/pr/2004/February/04_enrd_105.htm.

[4] Premium Standard Farms, *Air Emissions Monitoring Completion Report* (Nov. 17, 2004).

- A 2002 joint University of Iowa/ Iowa State University CAFO recommended a safe health standard for ammonia at a property line of a residence of 150 parts per billion (ppb) for a one hour time weighted average. According to DNR records, there have been hourly averages as high as 1,751 ppb at some of the CAFOs in Iowa.

2. Do you agree with the assertion by some that CAFOs are adequately regulated and broadly permitted under the Clean Water Act and the Clean Air Act? If not, please describe why not.

Answer: I do not agree that CAFOs are adequately regulated and broadly permitted under the Clean Water Act (CWA) and the Clean Air Act (CAA). Although EPA and the States have permitted some AFOs under other federal statutes, CERCLA is still necessary to fill critical gaps.

CAFOs are not broadly permitted under the CAA and CWA. No CAFO has ever obtained a CAA permit. Although the Clean Water Act has required large livestock operations to obtain permits for more than 30 years, noncompliance has been widespread. In 2001, EPA estimated that at least 13,000 concentrated animal feeding operations were required to have Clean Water Act permits, but EPA and States had issued just 2,520 permits.[5] Some of the states with the highest numbers of CAFOs have permitted the fewest numbers of CAFOs under the CWA. For example, Arkansas has only issued permits to 5% of its 2,110 CAFOs, and Iowa has only issued NPDES permits to 2% of its 1,859 CAFOs.[6]

A recent court decision which overturned certain provisions of EPA's CWA rules for CAFOs, may also result in fewer CAFOs being permitted under the CWA. In Waterkeeper v. EPA, the court ruled that CAFOs are not required to obtain NPDES permits unless there is an actual pollution discharge from a CAFO. EPA is revising its rules in light of the court's ruling; however some states and industry representatives have already taken the position that many CAFOs are now exempt from the requirement to apply for CWA permits. For example, the Des Moines Register quoted Mr. Gene Tinker of the Iowa Department of Natural Resources as stating that "[b]ecause Iowa law bars such discharges, virtually all confinement operations would be exempt from the EPA's rules under the court's ruling." See also Letter from American Farm Bureau Federation, et. al., to South Dakota Department of Natural Resources Regarding NPDES permitting after *Waterkeeper v. EPA* (Aug. 4, 2005) ("operators may manage their operations to avoid discharges and opt not to seek NPDES permit coverage knowing that they face potential enforcement penalties for any accidental discharges that occur despite their best efforts").

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[5] USEPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule (CAFOs), 66 Fed. Reg. 2960, 2968 (2001) [hereinafter USEPA, *CAFO Proposed Rule*].

[6] EPA, *CAFO Rule Implementation Status: National Summary* (Feb. 28, 2005).

Even if a facility were to have a federal permit, the permit would not necessarily regulate all of the releases of hazardous chemicals. A Clean Water Act permit, for example, would not address releases of hazardous chemicals to the air and, conversely, a Clean Air Act permit would not address releases of hazardous chemicals to water. Furthermore, not all statutes regulate the same chemicals. For example, the Clean Air Act does not regulate ammonia or hydrogen sulfide as hazardous air pollutants. Although CERCLA's list of hazardous substances were first identified under other statutes, including the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act, CERCLA authorizes the Administrator of EPA to add to this list "substances [like ammonia and hydrogen sulfide] which, when released to the environment may present a substantial danger to public health or welfare or the environment..."[7] Thus, EPCRA and CERCLA are necessary complements to federal permitting statutes to address hazardous pollutants that would not otherwise be regulated.

3. Please provide your views, based on your knowledge and experience, of the level of administrative burden that arises from the reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right to Know Act.

Answer: The level of administrative burden that arises from the reporting requirements under CERCLA and EPCRA is extremely low.

Section 103 of CERCLA provides that any person in charge of a facility from which a hazardous substance has been released in a reportable quantity (RQ) must immediately notify the National Response Center ("NRC").[8] For example, releases of ammonia and hydrogen sulfide that exceed 100 pounds per day must be reported under section 103.[9] *One telephone call to the National Response Center fulfills the requirement to report releases of hazardous substances under CERCLA.*

In addition to the reporting requirements under CERCLA, owners and operators of facilities must also provide immediate notice of the release of an extremely hazardous substance under EPCRA. Section 304(a) requires an owner or operator of a facility to report the release of an extremely hazardous substance to designated state and local officials, if "such release requires notification of section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980."[10] *One telephone call to the appropriate state and local authority also fulfills the initial requirement to report releases of hazardous substances under EPCRA.* The statute also requires a written follow-up emergency notice to the state and local officials "as soon as practicable after the release" to update the initial notice's information. 42 U.S.C. § 11004 (a).

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[7] 42 U.S.C. § 9602 (a).

[8] 42 U.S.C. § 9603(a).

[9] 42 U.S.C. § 9603; 40 C.F.R. § 302.4.

[10] 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1).

Section 103(f)(2) of CERCLA further provides for relaxed reporting requirements for continuous releases.[11] If a person can demonstrate that the releases are continuous or stable in quantity and rate, then notice of the release is only required to be given annually. Similarly, the regulations implementing EPCRA provide that reporting requirements do not apply to "[a]ny release that is continuous and stable in quantity and rate under the definitions of 40 C.F.R. 302.8(b)." However, persons still have to provide the initial telephone notification required under Section 304(a) and (b) and the initial written notification under Section 304(c).

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[11] 42 U.S.C. § 9603(f).

The Honorable Paul E. Gillmor

1. **In your testimony, you talk about nutrient uptake rates as part of nutrient management plans. Can you explain what you mean by the difference between a nitrogen uptake plan and a phosphorus uptake plan? How does a farmer increase one nutrient over another when applying manure uniformly to his fields?**

Nitrogen and phosphorus are both essential elements for plant growth, and ensuring a sufficient quantity of these nutrients will maximize crop production. The agronomic balance sought in a nutrient management plan is intended to supply these nutrients to the plant need, but not to over apply at such an excess that the nutrients are prone to run-off or erosion loss to nearby streams.

Historically, farmers applied nutrients to the soil based on the crop's demand for nitrogen. When poultry litter is used to satisfy the nitrogen demand, this practice can result in a gradual build-up of soil phosphorus, as not all the phosphorus will be utilized by the plant. Because the phosphorus in poultry litter (and other animal manures) is not very soluble in water, it is "fixed" in the soil and not prone to runoff. Farmers considered this "banking" of phosphorus in their soil, against the day when litter may not be available for application. Until 2000, a farmer could go into an NRCS office and obtain a nitrogen based nutrient management plan utilizing poultry litter, as this was the accepted agricultural practice. However, due to increased water quality requirements, and concern about fate of phosphorus when farmland is disturbed and converted to other uses has gradually led to reliance on phosphorus based nutrient management plans.

An example may best illustrate the difference. For example, corn requires about 180 lb/acre of nitrogen, and 50 lb/acre of phosphorus. Poultry litter averages about 3% nitrogen and 1.3% phosphorus, or, in other words, every ton of litter has 60 lbs of nitrogen, and 26 lb of phosphorus. Therefore, on a nitrogen based plan, the farmer would apply approximately 3 tons/acre of litter to provide 180 lb/acre of nitrogen. This application rate also results in the application of 78 lb/acre of phosphorus, or approximately 28 lb/acre more phosphorus than the annual corn phosphorus requirement.

Alternately, application at a phosphorus based rate would only require application of about two tons per acre to meet the corn's phosphorus demand, or one ton per acre less than the nitrogen based rate. The crop would be short approximately 60 lb/acre of nitrogen.

The question is how does a farmer deal with this and still ensure adequate fertilization to maximize corn growth. The answer is to supplement the fields with solely a nitrogen fertilizer – like ammonium nitrate. One option, of course, is for the farmer to apply this each year at a rate of 60 lb nitrogen/acre. A more common practice is for the farmer to apply litter at the nitrogen based rate for two growing seasons. This would result in "banking" about 50 lb/acre of phosphorus in the soil. Then, in the third growing season, the farmer would apply no litter at all, and instead only supply ammonium nitrate. Because of the relative immobility of phosphorus application averaging over a 3-5 year period is common.

2. **You mention four tiers of regulation and/or oversight for the poultry grower. The first is the federal tier, with NPDES permits. The second tier is state regulation for application rates, and in some cases, requirements for nutrient management plans. The third tier is the processor, the integrator, which provides a contractual assurance that poultry waste and litter will be utilized in an environmental sound manner. What is the fourth tier of regulation of oversight?**

   There are four tiers of regulation and/or oversight of the poultry farmer to ensure agronomically and environmental sound re-use of litter. The first tier is the federal CAFO rule and NPDES permit system. The second tier is additional state regulations for nutrient application rates and management plans. The third tier is the integrator who requires the farmer to develop and implement a nutrient management plan. The fourth tier is the farmer's lending institution or bank holding the mortgage note for the poultry houses or subsequent improvements of same. Lenders require preparation and implementation of nutrient management plans as well.

3. **You note in your statement that commercial fertilizer application on farms has no oversight or regulation, but that really isn't the case, is it? The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) permits the application of commercial fertilizer to farm land and regulates the selling and buying of commercial fertilizer. Since manure would be considered a hazardous substance under CERCLA, wouldn't requiring similar regulation of "organic" fertilizer be in step with other facets of the fertilizer industry?**

   The requirements in FIFRA primarily pertain to labeling issues, to ensure the product is accurately characterized in nutrient makeup. This information is essential for the end user, and provides confidence the product will meet the fertilizer needs of a crop.

   Similarly, the CAFO rule, many state regulations, and the marketplace itself demand the poultry growers supply the same information, whether they are selling to a third party or utilizing the litter on their own land. In most poultry producing states, such testing is provided by Extension Service, the state department of agriculture, or other institutions, often at no cost. This mimics the FIFRA requirements.

   Where regulations differ is with respect to the nutrient management plans. Basically, all poultry producer must prepare and implement a nutrient management plan. While many commercial fertilizer users involved in agriculture also voluntarily prepare a nutrient management plan, there is no requirement for them to do so. Further, the non-ag users of commercial fertilizer – homeowners, commercial properties, etc. – rarely have nutrient management plans.

   So the use of litter is already more regulated then the use of commercial fertilizer. Litter also has some significant environmental advantages compared to commercial fertilizer. It restores carbon to the earth, rather than combusting methane to produce commercial fertilizer. It improves soil tilth, lessening the impact of drought and increasing the resistance to erosion. It provides natural, slow release nutrients to feed crops; many commercial fertilizers provide a more rapid "green-up;" but in doing so are susceptible to greater loss to the environment. The nutrients in litter are less soluble than those in commercial fertilizer, therefore less prone to runoff. Regulating litter and other manures under CERCLA, when it is already regulated or controlled via nutrient management, and when it has so many environmental benefits over commercial fertilizer will not yield any environmental improvement, but will yield increased cost for the American farmer.

4. **Dr. Lawrence, of Johns Hopkins, argues in his written testimony that avian influenza could have a seriously detrimental effect if it took hold in the largest U.S. poultry producers. As I understand it, CERCLA is a response law, not a prevention statute. Do you think there is a legitimate link between avian flu and a lack of CERCLA application to CAFO's? Are you aware of any academic or other professional institutions that support your view?**

CERCLA applies to the release of certain hazardous chemicals, not the presence or absence of avian influenza.

U.S. poultry production is intentionally set up to prevent disease in commercial poultry flocks. Production occurs in separate, enclosed production buildings with clean water and carefully formulated feeds, all specifically designed to keep disease-causing vectors away from the flock. The current avian flu can be traced to poultry coming into contact with wild birds that have the virus. This does not occur in the U.S. production facilities.

In addition to secure housing, the U.S. industry also limits access to human contact with poultry (again, in contrast to Asia); the flock is also checked weekly by trained technicians from the integrator that would rapidly identify, isolate, and destroy any flock with even a low-pathogenic virus. Routine pathogenic testing is also conducted on flocks as a further safeguard. Attached are a recent press release from USDA and a summary of congressional testimony that corroborates this position.

Dr. Lawrence's supposition that modern U.S. poultry practices are a cause or source of avian influenza is antithetical to the facts. Propagation of AI outbreaks in poultry occur where there is free contact of poultry with migratory fowl, little or no private or government surveillance of poultry flocks; unregulated, close contact of members of the general public with poultry flocks, and live-bird market places where transmission of the disease can occur. All of these conditions are routine in Southeast Asia where the current high pathogenic virus has thrived, none of these conditions apply to modern commercial U.S. poultry production practices.

Transcript of Technical Briefing regarding Avian Influenza U.S. Department of Agriculture -
Washington D.C. - October 26, 2005
Release No. 0461.05

[This document is available online:
www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=tru%C2%AD&contentid=2005/10/0461.xml]

National Chicken Council

SAFEGUARDS IN PLACE TO KEEP "ASIAN FLU" OUT OF U.S., POULTRY INDUSTRY TELLS SENATE

Thursday, November 17, 2005

WASHINGTON, November 17, 2005 -- The U.S. government and the poultry industry have numerous safeguards in place to keep "Asian flu," H5N1 highly pathogenic avian influenza, out of the country, an industry spokesman told a committee of the U.S. Senate today. "The United States has multiple lines of defense against Asian H5N1 highly pathogenic avian influenza," Dr. Don Waldrip, an industry veterinarian testifying for the National Chicken Council, told the Senate Committee on Agriculture, Nutrition and Forestry at a hearing today. Waldrip noted that the "Asian flu," a specific subtype of avian influenza, does not exist in the United States and has never been detected in chicken flocks in this country. He noted that firewalls against the Asian bird flu include: • The U.S. has never imported any poultry products from the countries now affected by H5N1 highly pathogenic avian influenza; none of them have ever been authorized to ship poultry products to the U.S. Other bird products, such as feathers, are banned, and live birds such as pet birds are put under quarantine. • Extensive flock testing and surveillance programs are in place and the level of testing will continue to increase, he said. The federal and state governments and the industry cooperate in testing and surveillance, he said. • Federal scientists are monitoring migratory birds in Alaska for any indication that migratory birds are carrying the virus into North America. No sign of H5N1 has been detected yet, he said. • The poultry industry has policies on biosecurity to prevent the virus from being inadvertently carried onto the farms where birds are produced, he said. The United States poultry industry is also fundamentally different from the Asian countries in which H5N1 highly pathogenic avian influenza has been a problem, Waldrip noted. "Poultry production in the affected areas of Asia relies mostly on small farms and free-roaming backyard or village poultry of mixed species that come into frequent and close contact with people," he said. "The virus is present in wild birds, especially waterfowl, and there is often a commingling of several domestic and wild avian species," he said. Birds are often sold in live markets in Asia, creating "almost perfect conditions" for the perpetuation of the virus, he said. "In stark contrast, chickens in the United States are mostly raised in enclosed houses, a practice which greatly reduces the risk of exposure to wild birds and predators," he said. "Good biosecurity practices are followed on the farms and throughout our production or live operations, and the health status of the flocks are monitored throughout the growout cycle." "The coordinated surveillance and testing program conducted by industry and government in this country simply does not exist in Asia," he noted. "If testing and flock surveillance should result in a positive finding of an H5 or H7 strain of AI in the United States, it would be the policy of our industry and government to eradicate the avian influenza as quickly as possible after detection. We would immediately destroy the infected flock or flocks and institute quarantines and testing on other flocks in that area." Waldrip urged the federal government to contribute to the eradication of "Asian bird flu" in its current range in Asia. He said that could help prevent it from spreading to the United States. Waldrip is a member of the American College of Poultry Veterinarians and is director of animal health and live production for Wayne Farms LLC of Oakwood, Georgia. He is a member of the National Chicken Council Growout Committee. The National Chicken Council represents integrated chicken producer-processors, the companies that produce, process and market chickens. Member companies of NCC account for approximately 95 percent of the chicken sold in the United States.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. **Your testimony states, "Unequivocally, broiler and turkey farms are not violating Clean Air Act standards, or Clean Air Act permitting requirements." What Clean Air Act standards and permitting requirements apply to broiler and turkey farms?**

   What is the basis for the statement in your testimony that "we are fully in compliance [with Clean Air Act regulatory requirements]"?

   The Clean Air Act regulates emission of several "conventional" air pollutants including lead, nitrogen oxides, ozone, particulate matter (regulations currently for PM-10 but changing to PM 2.5), sulfur oxides and VOC's. Additionally, it regulates certain hazardous air pollutants (HAP's). Permitting is required under Title V of the Act if conventional pollutant emissions exceed 100 tons/year, or if there is more than 10 tons/year of a single HAP, or 25 tons per year total HAP. In some "non-attainment" regions, primarily in urban areas, lower thresholds exist.

   Please note that, in 2003, the National Academy of Science reported to EPA that no reliable basis currently exists for estimating these emissions. Indeed, part of the rationale behind the recent Air Consent Agreement, in which most poultry production is represented, was the current inability to quantify these emissions accurately.

   Please also note broiler and turkey production houses have no air discharge stacks. Rather, their emissions are diffused through natural ventilation (a non-regulated fugitive emission) and through ventilation fans. Similar to literally millions of other ventilation systems in warehouses, homes, offices and manufacturing plants across the country, these systems were installed to provide a comfortable setting for the occupants – in this case the occupants are chickens or turkeys. Like other ventilation systems in these many other applications, the exhaust will contain marginally elevated levels of some air pollutants. Normally, routine ventilation system exhaust is also considered fugitive. In order to compare broiler and turkey farm emissions with Clean Air Act standards, it is necessary to set these notes aside for a moment, and assume the emissions emanate from a single stack, rather than dozens of ventilation fans, likely spread out over a 2-3 acre area on an almost exclusively family owned, family operated farm. Provided in the table below is an estimate based on these assumptions.

   The Clean Air Act pollutants of PM-10, VOC, and hydrogen sulfide are most commonly cited as those that potentially may be present at a level of regulatory concern. The source for these estimates is also listed; they are all from recent (post 2003) studies.

Parameter	Type Poultry	Emission Rate	# of Birds for 100 TDY	Reference
PM-10	Broiler	26.5 mg/day/bird	9,400,000 birds	1
VOC	Broiler	0.0037 lb/bird/yr	54,054,000 birds	2

PM-10	Turkey	12.9 mg/day/bird	1,920,000 birds	3
H_2S	Turkey	0.09/mg/day/bird	260,000,000 birds	3

Note the average broiler farm has a capacity of approximately 61,000 birds, or less than 1% of the number of birds necessary to exceed the most restrictive parameter under the Clean Air Act for which current data exists. Approximately 99% of all poultry farms, which are almost exclusively family owned and operated agricultural enterprises, have capacity of less than 200,000 birds. While there may be a handful of farms with over a half million birds, there is not a farm that even approaches the 9 million bird threshold. Indeed, to build such a farm would be a biosecurity folly.

For turkeys, the average poultry farm has a capacity of approximately 26,000 birds, or 1.3% of the number required to reach a Title V major source permit requirement. There are no farms that approach this size if for no other reason than biosecurity concerns.

2. For each of the following air pollutants, please state (i) whether broiler or turkey farms emit that pollutant, and, if so, (ii) whether emissions of that pollutant from broiler or turkey farms are regulated under the Federal Clean Air Act and describe the nature of the regulation.

(a) Ammonia
(b) Hydrogen sulfide
(c) PM2.5
(d) Coarse particles
(e) Volatile organic compounds
(f) Nitrogen oxides

Ventilation exhaust from poultry farms could contain trace quantities of any of the pollutants listed. However, the exercise in #1 above demonstrates these levels are far below levels of regulatory concern, i.e., the quantity emitted is far, far lower than the quantities regulated under the Clean Air Act.

Note particulate matter regulations are currently written for PM10, not "coarse particulate" or PM2.5. Standards are being developed to shift particulate emission regulations to include PM2.5.

3. Do you believe that animal "manure" should be treated the same as chemical fertilizers for the purpose of "the normal application of fertilizer" exclusion from the definition of release under Superfund?

The use of litter as an organic fertilizer clearly conforms to "the normal application of fertilizer" exclusion under CERCLA.

4. **How many poultry farms (broiler, duck, layers, and turkeys) have ever reported releases of ammonia or hydrogen sulfide pursuant to Section 103 of the Comprehensive Environmental Response Compensation and Liability Act**

(CERCLA) or the Emergency Planning and Community Right to Know Act (EPCRA)? Please identify those animal feeding operations that have reported and the amounts of the release reported.

The Environmental Protection Agency would be a far better source for this information. To my knowledge, no turkey farms have ever reported; and only a handful of broiler farms (for ammonia only) in Western Kentucky after an activist group sued two producers and a processing company.

5. **Has any poultry farm ever had a penalty assessed against it for failure to report under CERCLA or EPCRA? If so, please provide the amount of the penalty and the name of the case.**

I am unaware of a broiler or turkey farm that has paid a penalty for a CERCLA/EPCRA release reporting case.

6. **What size poultry flock would likely trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day? Please provide the basis of your calculation.**

This question presumes all poultry houses on a facility should be aggregated for release reporting purposes; whereas over two decades of regulatory action and guidance from EPA make it clear the releases threshold should be viewed on a per house basis, not a whole farm basis.

Further, there has been tremendous disparity in the reported levels of ammonia released during production, by an order of magnitude or more. Again, the Air Consent Agreement is intended to fill that data vacuum with reliable information.

There is also tremendous variability in release rates based on the bird size, temperature, moisture, ventilation practices, etc. So, on the day of placement of birds, there may be an "ammonia release" of 2 lbs of ammonia per averaged size house; halfway through the growout cycle this may increase to 5 lbs per day, and at the end of the growout cycle it may be 8 lbs per day, depending again on temperature, climate, moisture, etc.

Note further that some of the "ammonia" is almost undoubtedly in an aerosol form of ammonia hydroxide, which has an RQ of 1000 lb. No research has been conducted on the actual form of ammonia leaving the house, a rather fundamental question in trying to determine whether a threshold has been exceeded.

Based on these items, it is impossible to provide an answer with any surety to this question. My belief, based on the limited data available, is that neither a broiler house nor a turkey house would exceed the reporting requirements for ammonia or hydrogen sulfide.

REFERENCES FOR QUESTION #1

1. Redwine, J.S., Lacey, R., Mukhtar, S., and Carey, J., Concentration and Emissions of Ammonia and Particulate Matter in Tunnel-Ventilated Broiler Houses Under Summer Conditions in Texas, TRANSACTIONS OF THE AMERICAN SOCIETY OF AGRICULTURAL ENGINEERS, 45(4):1101-1109 (2002), available at http://caaqes.tamu.edu/Publications/se1946.pdf.

2. Summers, M.D., Mattos, B., Gaffney, P., FitzGibbon, M., Duke, D., Marnatti, J., Kim, S., Stabelfeld, D., Clutter, K., Ernst, R., and Humbert, D., Final Report: Quantification of Gaseous Emissions from California Broiler Production Houses (prepared by AIRx Testing, California Air Resources Board, California Department of Food and Agriculture, California Poultry Federation, Foster Farms, and University of California, Davis – Animal Science) (February 17, 2005).

3, Schmidt, D.R., Jacobson, L.D., Janni, K.A. 2002. Continuous Monitoring of Ammonia, Hydrogen Sulfide and Dust Emissions from Swine, Dairy and Poultry Barns. ASAE Meeting Paper No. 024060. Chicago, Illinois.

The Honorable Charles F. Bass

1. **The funding levels for the Environmental Quality Incentive Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79 million in EQIP funds but already has a backlog of $1.41 million in requests for projects it can't fund. With the uncertainty of agriculture programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my question is without a substantial increase in this program will producers be able to get their operations in compliance?**

   Respectfully, note the above question implies broiler and turkey operations are currently "out of compliance."

   These poultry producers do not exceed any current permitting requirements under the Clean Air Act. And, it is only in the last few years, in carefully targeted court districts, that activist groups have been successful in third-party lawsuits under CERCLA.

   These activist lawsuits have focused on ammonia and phosphorus. With respect to ammonia, the recent air consent agreement, in which the majority of the poultry industry is participating, is designed to quantify these emissions. The reason is that there is no current data that is accepted as adequate to quantify releases, according to a 2003 National Academy of Science study commissioned by USEPA. Poultry producers believe that completion of this carefully designed study, and subsequent guidance by EPA, will clearly show their facilities are not exceeding the release reporting requirements under CERCLA, and, more importantly, not causing a threat to human health or the environment.

   With respect to phosphorus, plaintiffs suits have expanded the congressionally mandated reporting of phosphorus – the element that poses an immediate combustion hazard – to phosphate, a substance present in animal manures, but also present in the foods we eat, the liquids we drink, the detergents we use; in short, present all around our everyday lives.

   It is only this expansion of release reporting from the statute endorsed "phosphorus" to compounds which contain the element phosphorus, such as phosphate, that exposes the use of litter or other animal manures to enforcement under CERCLA. And the precedent set by this expansion of the congressional intent has far-reaching consequences. For example, if the phosphate in litter is regulated, what about the phosphate in fertilizer … or wastewater discharges … or in the garbage of a fast-food restaurant? Alternately, is the application of road salt (NaCl, or sodium chloride) subject to the release reporting requirement of elemental chlorine of 10 lb/day?

   For over two decades, CERCLA has been the law of the land, and only recently have these allegations been made, in carefully selected courts. While EQIP funding is important to ensure U.S. farmers can continue to produce high quality, low cost foods in an environmentally friendly way, and a tremendously successful program, its continued funding should be justified by those existing successes, without relying on the misapplication of CERCLA to modern broiler and turkey farm practices.

Responses to Written Questions Submitted by The House Energy & Commerce Committee

Wiley Stem, Assistant City Manager for the City of Waco

The Honorable Paul E. Gillmor

1. Are you aware of any occurrence at any time within the past five (5) years where the sanitary sewer collection and distribution system of the City of Waco has overflowed and that overflow of municipal waste (sewer) entered into any conveyance, which directed any untreated municipal waste into Lake Waco? Has the City of Waco ever been brought under enforcement for violating state or federal environmental rules for discharges of untreated municipal waste water (sewer)?

No, I am not aware of the overflow of any untreated municipal waste or sewage into Lake Waco. During rain events the capacity of the sanitary sewer system may be exceeded, which can lead to an overflow from the collection system. However, in those instances where the capacity of the sanitary sewer system is exceeded, because of the design of the system, any overflow is primarily storm water. Additionally, upon becoming aware of an overflow, the City takes steps to, among other measures, capture, treat and disinfect to minimize any environmental impact.

Yes, over the course of its history the City of Waco, like other cities of similar size and population, has had enforcement actions brought against it for alleged violations of state and/or federal rules for discharges of untreated municipal wastewater.

The City has a very complex and extensive system (a sanitary sewer system) for collecting and treating waste generated by its citizens. There are times when there are overflows from that collection system, but the City collects and cleans up waste from the sewer system during these overflows and that waste does not contribute to the taste and odor problems associated with drinking water out of Lake Waco. Unlike the City, the dairies do not have such a system. The dairies generate huge amounts of waste per cow, per day, and then they take that waste and spray and spread it on their waste application fields. That waste is not treated. That waste is free, particularly when it rains, to run off of those fields and into the North Bosque River. That run-off contributes substantially to the taste and odor problems in Lake Waco.

2. Of the eight (8) dairies that your city is suing, how many of them do not have all of their permits under the Federal clean water act? Under what authorities are you bringing this suit? Are these dairies CAFOs, within the meaning of the federal law or are you using this term more generically?

The City of Waco initially brought suit against fourteen dairies. Of those original fourteen dairies eight have settled with the City of Waco. This leaves six dairies as defendants in the currently pending litigation. While I'm not sure what you mean by "all of their permits," if you are referring to the National Pollutant Discharge Elimination System (NPDES) permit or the equivalent state operational permit, then out of the six dairies remaining as defendants in this lawsuit one, Aztex Dairy, does not have the necessary permit.

The City of Waco has brought this suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Federal Water Pollution Control Act (FWPCA), the Texas Solid Waste Disposal Act (TSWDA), and various state common law theories of liability, and those laws provide the authority for this action.

The term "CAFO" is not being used "generically" or colloquially. The six dairies that are currently defendants in this lawsuit qualify as concentrated animal feeding operations (CAFOs) as defined under applicable laws.

3. How many of the complaints that you have in your testimony, regarding the practices of the dairies in your area, relate directly to Clean Water Act permits and or violations? Other than having another legal tool at your city's disposal, what does CERCLA and EPCRA bring you that Texas environmental law or the Federal Clean Water Act does not already provide?

A substantial number of the complaints that the City of Waco has regarding the practices of dairies in our area relate directly to violations of those dairies' permits, as well as violations of the Clean Water Act (also known as the Federal Water Pollution Control Act). The City of Waco originally sent out Clean Water Act notice letters to fifteen dairies in the watershed. These letters provided notice of the City of Waco's intent to file a lawsuit under the citizen enforcement provisions of the Clean Water Act unless the dairies were willing to cooperate in taking steps to minimize pollution from their dairy operations. As part of these letters, the City of Waco attached the required list of alleged violations of the Clean Water Act that had been committed by that dairy. Each and every dairy against which the City brought suit had a history of failing to comply with the requirements laid out in their permits, and, consequently, a history of violating the Clean Water Act. Additionally, these dairies have continued to violate the Clean Water Act since this lawsuit began.

The City of Waco could pursue its lawsuit solely under the Clean Water Act, but that piece of legislation does not afford the broad range of remedies that are

available under CERCLA. Specifically, that statute does not allow for private recovery and thus does not afford the City of Waco an avenue to recover for its response costs. As can be seen from the City of Waco settlements with eight dairies, often just exposure to liability for response costs will cause industrial polluters, like defendants in this lawsuit, to adopt better and more environmentally sound waste management practices. CERCLA lawsuits do not always result in monetary awards; sometimes they result in corrective action to clean up the environment. It is also not unreasonable or unfair for large industrial agricultural operations, like defendants we have sued, to be liable for the response costs they cause others to incur in accordance with the National Contingency Plan, which is designed to ensure a proper and quality response to pollution. Put simply, without liability under CERCLA, it will be nearly impossible for municipalities like Waco to get effective and meaningful relief against large industrial operations that pollute our nation's waters.

4. In your testimony, you mentioned that Lake Waco is the regional water supply and that there is no viable, short or long-term alternative. Has the City of Waco needed to provide an alternate source of drinking water to its residents because of the pollution caused by the dairies? If so what is it?

Despite the taste and odor problems associated with drinking water out of Lake Waco, the City of Waco has not had to provide an alternative drinking source. However, the City of Waco has had to spend millions of dollars to make sure that the drinking water out of Lake Waco is clean and safe for the citizens of Waco despite of the pollution caused by large industrial dairies. If the waste disposal practices of these large industrial dairy CAFOs continue it will be more difficult for the City to meet Federal drinking water standards, such as the disinfection by-products rule and the enhanced surface water treatment rule, and the life of the Lake Waco reservoir will be shortened. Recent Federal regulations regarding cryptosporidium and giardia, both of which are a direct result of run-off from dairy waste application fields, will further increase the City's costs.

Congress, by exempting animal waste from the definition of "hazardous substance" under CERCLA, would be allowing industrial polluters to continue to pollute the nation's water without liability. At the same time, new Federal drinking water standards require downstream municipalities, like the City of Waco, to spend more money to clean up the waste produced by these industrial polluters. Without a law like CERCLA applicable to large industrial dairies, the City would have no mechanism to recover the cost of cleaning up pollution, while the industrial polluters could continue to avoid any responsibility for their reckless and environmentally harmful practices.

5. Your testimony mentions that large industrial dairies began moving into the North Bosque River Watershed in the 1980s. Is this the first time that dairy cows had been raised there? If not, how did your community deal with the waste from dairy farms? Was it an issue for the watershed? What other sources could be contributors to your pollution problem?

To the best of my knowledge I believe that dairy cows and dairy farms have been in the area for a number of years. Early on, these dairies were very small operations. Those small family farms were able to use the waste generated on site and they handled their waste in a manner which did not damage water quality in the watershed. The influx of large industrial dairies, as opposed to smaller operations, began in the 1980's. As a result of a large increase in the number of cows and practices intended to maximize production per cow, there was a significant increase in the amount of nutrients, and specifically phosphorus, which were being released into the North Bosque River and carried downstream to Lake Waco. Prior to the 1980's, the City of Waco had experienced taste and odor problems with the drinking water out of Lake Waco only on a sporadic and temporary basis. Since the influx of industrial dairies into the watershed the taste and odor problems continue to get worse. The number of dairy cattle in the watershed tripled in the early 1990's, and this led to the City's water treatment costs tripling as well. While dairies have been in the area for a number of years, these large industrial dairies are a more recent phenomenon and are the source of the pollution in Lake Waco.

There are a number of potential sources of phosphorus. Phosphorus from the natural background of the watershed (i.e. deer, beef cattle on open ranges, etc.) and upstream wastewater treatment plants would be only two examples of potential sources of phosphorus in the watershed. However, large industrial dairies in the North Bosque River watershed represent the most significant source of phosphorus being deposited into Lake Waco. The TCEQ has recently reported that 90% of the controllable phosphorus entering the North Bosque River originates from CAFOs located in the watershed. The Texas Institute on Applied Environmental Research (TIAER) at Tarleton State University, which is located in the heart of the dairy industry upstream in our watershed, has concluded that 35-44% of the phosphorus in Lake Waco is directly attributable to runoff from dairy waste application fields. It is thus clear that while there are numerous potential sources of phosphorus in the watershed, the most significant contributor of phosphorus into Lake Waco is the dairies, and the pollution in Lake Waco cannot be eliminated without substantially reducing runoff from dairy waste application fields.

6. Congress explicitly mentions agricultural waste, be it liquid, solid, or gaseous, in the Solid Waste Disposal Act. In addition, the Safe Drinking Water Act allows the EPA emergency authority to address potentially dangerous threats to drinking water. Has EPA, or have you petitioned EPA, for use of this authority regarding the manure output and practices in the Bosque River Watershed?

I am not aware of the EPA taking administrative action against the dairies, nor has the City of Waco "petitioned" the EPA to take such action. The City has worked closely with the EPA and the TCEQ, the state environmental regulatory agency, throughout this process in an attempt to reach an amicable solution with the dairies without having to file a lawsuit. Additionally, the City has become extensively involved in the permit process for these dairies to ensure that the permits issued to the dairies include appropriate restrictions on dairy operations to ensure environmentally friendly operations at these dairies in the future. Litigation was a last resort for the City in this matter. The City only brought suit after its efforts, conducted over many years, to negotiate a reasonable settlement failed. Because it was unable to reach a settlement and in an effort to clean up the North Bosque River, the City brought suit against a limited number of dairies with poor compliance histories. Contrary to what has been argued, this case is not an attack on agriculture.

It was brought against some of the dairies with the worst compliance history records to try to compel them to operate like most other dairies that do comply with the rules. We started with fourteen dairies and now only six are defendants in this lawsuit.

7. Your testimony states that many of the dairies have "maintained their land in such a way to as to have consistently and egregiously violated the applicable laws." Every Federal environmental law has provisions that allow you to force compliance with mandatory duties under the law. If this is the case, why hasn't your city or state done more to shut these dairies down or revoke their permits?

The City of Waco has no interest in trying to "shut down" the dairies or revoke their permits. In fact, I grew up on a farm and remain involved with my family's cow/calf operation to this day. The City of Waco understands how important the dairies are to the agricultural community and the economy of central Texas. We hope that the dairies will stay in this area and will continue to serve as a vital part of our economy. However, the City also wants to ensure that the dairies are acting in a responsible manner by complying with applicable environmental laws and regulations. To that end, the City spent eight years attempting to negotiate a resolution to this issue without having to go through the burden and expense of filing suit.

Throughout these discussions the City has simply asked the dairies to modify their operations in order to use waste in a beneficial manner, taking into account the level of phosphorus already on the field, the phosphorus needs of the crops on the

field, and the need to avoid over-applying phosphorus on the field. The City is merely asking these large industrial dairy CAFOs not to apply more phosphorus than a crop needs, not to apply more phosphorus when soil tests already indicate that phosphorus on fields is already sufficient, and to limit their application of phosphorus to agronomic rates when soil tests indicate more phosphorus is not needed. We do not believe this is too much to ask considering that both segments of the North Bosque River have been impaired for phosphorus since 1996.

After these negotiations failed to bring about a meaningful solution to the problem, the City sent out letters notifying the fifteen dairies of the City's intent to file suit under the Clean Water Act unless the dairy owner was willing to contact the City and work toward resolving the problem. Of the fifteen dairies that received this letter only one dairy contacted the City to try and reach an agreement while avoiding litigation. That dairy, like the others, had very high levels of phosphorus on its fields. He expressed his willingness to work with the City and to try to reduce phosphorus levels on his fields. The City has and will continue to work with that dairyman, and has not filed suit against him. None of the other fourteen dairies contacted the City. Therefore, the City had no other option but to file suit against the remaining fourteen dairies to force those dairies to come into compliance with applicable laws and regulations.

8. You complain in your testimony that taste and odor are the leading reasons you have brought CERCLA actions. However, taste and odor are secondary concerns under the Safe Drinking Water Act, while immediate removals of contaminants that threaten human health are the primary focus of the law. Is Waco's drinking water – that is the water you pipe to your citizens to drink -- in full compliance with all health standards under Federal and State law, including the Safe Drinking Water Act?

Yes, the City of Waco's drinking water is in full compliance with all applicable health standards under Federal and State law, including the Safe Drinking Water Act. However, the EPA recently lowered applicable limits for Trihalomethanes ("THMs") in drinking water. THMs are formed by organic material in the water reacting with chlorine disinfection processes. THMs are a direct result of phosphorus run-off from dairy waste application fields, which deposits organic material into Lake Waco. Although the City's THM levels have not exceeded current drinking water standards, the THM levels are a concern for the City because we do not want to even be close to having THM levels that could pose a potential hazard to our customers. The City has done research to identify process changes in our current treatment processes and we are implementing changes to reduce THM levels and protect the citizens who rely on Lake Waco for drinking water.

9. Your testimony states that 90 percent of the "controllable" phosphorus in Lake Waco is from CAFOs and 35-44 percent is from the dairy farms you are suing? First, does this figure include all the farms to which you have filed suit or only the ones still in active litigation? And, what is the City of Waco doing to reduce the other sources of phosphorus in Lake Waco? Are you using legal action?

According to figures provided by the TCEQ and the TIAER, 90% of the controllable phosphorus entering the North Bosque River originates from CAFOs located in the watershed, and 35-44% of the phosphorus in Lake Waco is the result of runoff from dairy waste application fields in the watershed.

Currently, the City of Waco is working with upstream wastewater treatment plants to reduce phosphorus outputs from those plants. There has been no need for legal action at this time because the owners and operators of these wastewater treatment plants have been cooperative in seeking to reduce phosphorus loading into the North Bosque River. Additionally, the City has been active in projects involving wetlands development and septic tank regulation. However, every comprehensive scientific study conducted on this issue has concluded that even if these other sources of phosphorus were completely eliminated, the City of Waco would still experience taste and odor problems and would still face challenges meeting Federal drinking water standards because of the dairies.

10. What are the top contaminants of concern to the City of Waco drinking water supply and what actions, including lawsuits, are you undertaking to reduce their occurrence?

Under the current regulations, synthetic or organic compounds from fertilizer and pesticide are the top contaminants of concern to the City of Waco drinking water supply. Currently, the City of Waco uses powdered activated carbon to reduce the levels of these compounds in the City's drinking water.

11. Does Waco charge it residents the true cost of providing drinking water to its residents? When is the last time your city increased its drinking water rates? Irregardless of what happens with the dairy farms, is your city willing to increase water rates to abate the phosphorus or other water problems?

The City of Waco charges its residents the true cost of providing drinking water. The Water Fund is a self-supporting entity, and its income is derived from sales of water to its customers. It is not supplemented by the General Fund in any way. It is completely self-supporting. An annual operating and capital budget is prepared and monitored throughout the year and rates are approved based on these budgets. The last water rate increase (12.3%) was effective October 1, 2005. Prior rate increases were FY 2003-04 -- 2.9% and FY 2004-05 -- 9.3%. Future rate increases to our customers based on Water Fund Pro Forma Reports are as follows:

- **FY 2006-2007 – 12.7%**

- **FY 2007-2008 – 8.2%**
- **FY 2008-2009 – 3.3%**
- **FY 2009-2010 – 4.5%**

The Waco City Council is aware of these projected increases and understands the need to maintain a clean and safe water source for our citizens. The Water Fund will see projected increases to customers in excess of 50% as a direct result of capital improvements being made to address water quality, a substantial portion of which will go directly to complying with Federal drinking water standards and addressing taste and odor issues caused by large industrial dairy CAFOs in the watershed. Compliance with environmental standards and regulations is very important to the City. We do not see clean and safe water as optional, but our citizens are now paying more for their treated water because of the pollution of Lake Waco by the dairies and the water rate burden on our citizens will continue to increase unless we can get the dairies to abate their pollution of our Lake.

The Honorable Ralph M. Hall

1. The City of Waco alleges water from Lake Waco has a taste and odor problem. Yes or no, is Lake Waco impaired? Yes or no, is the water quality of Lake Waco in the middle of all Texas reservoirs and used for public drinking water purposes? Can you comment on whether Lake Waco has ever been designated as impaired by either the U.S. EPA or the TX state environmental agency for any constituent, including phosphorous?

The City of Waco believes that Lake Waco is impaired, but the EPA has failed to designate it as impaired at this time. While I do not understand what you mean by "in the middle of all Texas reservoirs," Lake Waco is the sole source of drinking water for the City of Waco, and no viable alternatives exist from which the City could procure drinking water. Every comprehensive study that has been done proves that Lake Waco has been and continues to be impacted by large industrial dairy CAFO operations. At times, the bacteria and microbial contaminant levels in Lake Waco warrant posting the Lake for non-contact. Primarily, this occurs during rainfall in the watershed when large amounts of phosphorus and bacteria laden run-off from the dairy waste application fields are washed into the North Bosque River and carried into Lake Waco. Under low-flow conditions Lake Waco is "nominal" for recreation and drinking water purposes, despite the fact that algal blooms associated with lingering phosphorus are continually occurring.

2. The Texas Attorney General filed an Amicus Brief with the Western District Federal Court in Waco, with this brief making an argument of the difference between "elemental phosphorus" and "orthophosphate". Do you agree there is a distinct difference between two?

The Texas Department of Agriculture has filed a brief on this issue. Currently, these issues are squarely in front of the United States District Court for the Western District of Texas, and therefore I will not go into great depth about the City's position. It is the City's position that the type of phosphorus which the City contends is released as a result of the dairy operations is a hazardous substance as that term is defined under CERCLA. Additionally, the defendants in this lawsuit moved to dismiss this case arguing that dairy cow manure did not contain a hazardous substance under CERCLA. That motion was denied because the Court ruled that as it relates to that motion to dismiss, the phosphorus found within dairy cow manure is a hazardous substance under CERCLA.

3. Your testimony states that a dairy cow generates up to 115 pounds of manure per day. Where did you obtain this figure and is this an average figure or an upper-bound estimate? Also, your testimony states that dried dairy manure is stored on-site before disposal and that this dried manure has levels of phosphorus that exceed those at a "normal agricultural operation". First, what is a "normal agricultural operation"? Second, wouldn't a normal agricultural operation exceed its own limit just by virtue of storing dried manure on-site?

According to the American Society of Agricultural Engineers, a lactating dairy cow will produce 150 pounds of total manure per day. Based on this figure, my testimony that a dairy cow will produce 115 pounds per day is a low number since the actual number may be substantially higher. In my testimony I stated that the 50,000 permitted head of dairy cattle in the watershed would produce 5,750,000 pounds, or 2,875 tons of manure per day. In fact, based on the figure provided by the American Society of Agricultural Engineers, the amount of manure produced each day by dairy cattle in the watershed could be as high as 7,500,000 pounds, or 3,750 tons of manure every day. I never said that dried dairy manure is stored on-site. We do not believe that the dairies we have sued are normal agricultural operations.

4. Your testimony sites "best management practices" for dairy farms. Who has devised these "management practice" rules? Does 1 acre of land per cow seem like an awful lot of real estate under these rules?

These guidelines come from the TCEQ, the Texas administrative agency charged with enforcing environmental standards and regulations. In my testimony, I never said that a dairy should have 1 acre of land per cow; instead, I stated that a dairy should maintain 1.5 to 3 acres of land per dairy cow. For example, a 2,000 cow dairy ought to have 3,000 to 6,000 acres of land available to be used to properly dispose of the waste produced by its cows. Considering the enormous amount of waste produced by these cows, I think that maintaining 1.5 to 3 acres per cow is necessary to ensure that waste is not over-applied to a dairy's waste application fields. These "best management practices" are consistent with our goal that dairies only apply waste when needed, and then only at agronomic rates.

5. Your testimony states that the equipment and facilities that Waco would like to purchase to treat your water in Lake Waco will do nothing to improve the quality of the water except perhaps eliminate odor and taste problems. If so, are you telling me that you are merely suing these dairies for cosmetic changes in your drinking water?

No, I am not telling you that we have brought this lawsuit "merely" to bring about "cosmetic changes" in our drinking water. Anyone who lives in Waco and its surrounding communities and has to drink our water day in and day out, and experience the frequent and significant bad taste and odor in the water, will certainly challenge your statement that such problems are "cosmetic" only. Our

water does not look bad; rather, it tastes and smells bad, and our citizens deserve better water than we can give them even with the increased costs of treatment. And our citizens do not deserve to be forced to pay for all the extra treatment made necessary by upstream industrial size dairies that are causing the problem.

All I was saying was that the City of Waco is only asking these dairies to pay to remedy taste and odor problems with the drinking water out of Lake Waco that were caused by their poor practices. These changes will also ensure that our drinking water meets new Federal regulations concerning disinfection byproducts that are a direct result of the organic load the dairies deposit into Lake Waco. The City is not asking the dairies to pay for any other improvements to the City's drinking water system not related to eliminating the taste and odor problem in the water, or to pay for adding additional treatment capacity to our plants. The City is merely asking the dairies to share the burden of paying to clean up the pollution that they have caused by ensuring that Federal drinking water standards are met and the taste and odor problems associated with drinking water out of Lake Waco are resolved.

6. Under CERCLA, and subsequent interpretations by the Courts, a person who has been sued for cleanup under CERCLA can seek third-party contribution. I noticed you sued the insurance carriers of the dairies, leaving the dairies to face additional legal action against their insurance carrier, not to mention higher premiums and the loss of coverage altogether. How does this serve your purpose of getting a cleaner environment when it seems all you are driving at is raising money from these actions?

The City of Waco has not sued the dairies' insurance carriers. Raising money from this lawsuit is not the City's main goal. While money damages are the remedy available under CERCLA, and will be the remedy the City will seek if the case goes to trial, what the City is actually most interested in is cleaning up our Lake. That the City is not primarily motivated by money is best established by the eight settlements that have been reached so far with dairies in the lawsuit. Seven of those settlements involved no payment of money by the settling dairy or the insurance company, only requiring agreed to operational changes by the dairies. The one other settlement did involve the insurance carrier for the dairy paying some money rather than spending sums for a continued defense and the City paying over 95% of the money recovered from the insurance company to the dairyman in exchange for a conservation easement.

Even though the City is not motivated by money from this lawsuit, the possibility of exposure to a judgment for money damages to pay the costs of cleaning up their pollution has motivated several dairies to be better environmental stewards by agreeing to reasonable operational changes. As a result, the money damage remedy currently available under CERCLA is very important in our effort to clean up Lake Waco and protect our water supply.

7. The U.S. Department of Agriculture has declined to define a "family farm" and yet you claim that no suit has been filed against a one. Be that as it may, if, say, a few brothers jointly own a big farm, aren't they still a family farm. Moreover, what concerns me most is that the legal precedents are being set in this area for plaintiff litigants, who are being encouraged to "forum shop" Federal environmental laws and their citizen suit provisions while business defendants are statutorily required to comply with a finite set of laws and regulations, but must defend themselves against an amorphous universe of environmental laws. Do you consider this fair?

As I mentioned in my oral testimony, my family has owned and operated a cow/calf farm in Falls County, Texas since the early 1960's. A "family farm" respects its neighbors and does not manage waste in a manner that damages its neighbors property. I was familiar with the family operated dairies in the North Bosque River watershed in the 1950's, 1960's and 1970's. Most had less than 50 cows and the family members did the vast majority of the work. All of those family operations are gone, wiped out by the more cost efficient large industrial dairy CAFOs. One of the reasons these CAFOs are more cost efficient is that they do not internalize their waste management costs. They over-apply manure to their waste application fields, causing phosphorus to run-off during rainfall events. This is not agriculture, this is waste disposal. Even if these dairies are family owned, they should not be allowed to dispose of their waste in such an irresponsible and careless fashion. And if they do, they should have to compensate those that suffer damages.

When I use the term "family farm," I am merely using the term in the same way that members of congress and the farming industry used the term when they were attempting to justify legislation that would exempt any farming operation from CERCLA liability. I was not using that phrase as a term of art, nor did I base my use of that term on any administrative definition of the phrase "family farm." Instead, that phrase is merely meant to show the difference between the traditional small farm operation that built this country and the large industrial dairies that now populate the North Bosque River watershed. While you point out that the U.S. Department of Agriculture has not defined the phrase "family farm," every one of us conjures up a particular image when we hear that phrase, and I merely wanted to juxtapose that image of the "family farm" with the image of large industrial dairies that populate the North Bosque River watershed. If these large industrial dairy CAFOs are "family farms" then Ford Motor Co. is a "family car company" and Wal-mart is a "family grocery store."

You ask me if it is fair to ask these dairies to defend themselves against Federal environmental laws and regulations, which you claim are "amorphous." I ask you Representative Hall, is it fair to allow these dairies to pollute the North Bosque River watershed without sharing the burden of cleaning it up? Is it fair to allow large industrial "factory" farms to hide behind vague exceptions to environmental regulations to ensure that they are treated better than other industrial polluters? All the City of Waco wants is for these industrial dairies to comply with applicable

laws and regulations, and I certainly think that is fair.

I am not aware of any plaintiffs trying to "forum shop" to gain an advantage over the agricultural industry. Environmental statutes such as the FWPCA and CERCLA have very specific forum and venue rules that determine where a particular suit may be filed. Those provisions were enacted and may be amended by Congress without completely exempting large industrial dairy CAFOs from environmental regulation.

Finally, whether or not these dairies can be considered "family farms" is largely irrelevant. The more important question is whether or not these dairies are classified as CAFOs under Federal environmental law. If these dairies meet the definition of a CAFO, which they do, then it is inconsequential whether they are owned or operated by a family. Once a dairy qualifies as a CAFO it must live up to certain obligations and meet certain standards. These dairies should be held to those standards because they meet the definition of a CAFO, and they should not be given a blanket exemption from these critical environmental regulations merely because some people choose to refer to them as "family farms."

8. I have a hypothetical. Say I have, primarily, a modest sized dairy operation but raise row crops (corn and beans) for feed as well as for market. Since my fields will not be able to contain all the waste in the form of fertilizer, should the fact that I have it at all, on my site, subject me to comprehensive and highly regulated cleanup under Superfund law? Moreover, as I understand your arguments and court rulings on CERCLA, each of my fields as well as my barns should also be subject to Superfund cleanup, regardless of whether I have my permits? Is that correct?

Before I could respond to your hypothetical I would have to ask you a question, do you concentrate your cattle? Is your operation a CAFO as that term is defined under Federal environmental law? The defendant dairies in the City of Waco's lawsuit are not "modest sized dairy operations," they are dairy CAFOs with a substantial number of cows and waste. The waste from their cows does not lie where it falls. These CAFOs collect the waste and apply it to waste application fields in order to dispose of it, not in order to fertilize the fields to grow crops. If your operation could be characterized as a CAFO, and if you are collecting waste and disposing of it, rather than using it properly as fertilizer, then I think such disposal of this hazardous waste should be regulated under the law, and appropriate environmental standards should apply.

Also, to the extent that your dairy releases hazardous substances, which can be found in dairy cow manure, which lead to the incurrence of response costs then I think you should be subject to CERCLA liability, unless such releases could fairly be characterized as the "normal application of fertilizer." This is standard for liability under CERCLA, and I see no reason why your dairy operation or any other dairy operation should be held to a different standard than every other industry in this country.

As long as you can properly manage waste, and apply fertilizer through normal agricultural processes and in a sustainable manner, your farm would not be subject to CERCLA. Again, all we are asking the dairies to do is to only apply phosphorus to their waste application fields when the crops need phosphorus, and then apply phosphorus at agronomic rates.

9. You state in your testimony that if you look past the sensationalism, you can see that there are already mechanisms in place to address environmental concerns. Those mechanisms can work – when they are properly funded, when they are given the time to work and when they are not ignored by those engaged in a litigious frenzy. Can you further explain for the Committee what those mechanisms are and whether certain ones have been administratively exhausted before pursuing this multimillion dollar litigation?

The City has conducted itself very responsibly in seeking to avoid this lawsuit by negotiating an amicable settlement with the dairies, and in the prosecution of this lawsuit since its inception. The City of Waco is simply a municipality that has decided to stand up for its citizens and demand that industrial polluters stop evading environmental regulations, which I hardly think should be characterized as a "litigious frenzy."

As far as other "mechanisms" to address environmental concerns, I think it is important to examine why CERCLA is such a critical tool for citizens seeking to stop pollution. The City of Waco could pursue its lawsuit solely under the Clean Water Act, but that piece of legislation does not afford the broad range of remedies that are available under CERCLA. Specifically, that statute does not allow for private recovery and thus does not afford the City of Waco an avenue to recover for its response costs. As can be seen from the City of Waco settlements with eight dairies, often just exposure to liability for response costs will cause industrial polluters, like the dairies in our watershed, to adopt better and more environmentally sound waste management practices. CERCLA lawsuits do not always result in monetary awards; sometimes they result in corrective action to clean up the environment. It is also not unreasonable or unfair for large industrial agricultural operations, like the dairies in our watershed, to be liable for the response costs that they actually cause others to incur in accordance with the National Contingency Plan, which is designed to ensure a proper and quality response to pollution. Put simply, without liability under CERCLA it will be nearly impossible for municipalities like Waco to get effective and meaningful relief against large industrial operations that pollute our nation's waters.

The Honorable Paul E. Gillmor

1. **You state in your testimony that farmers often go above and beyond what is required by law to protect the environment, including some who have installed manure digesters and others who have provided additional buffer zones. Can you expand on these actions and how they address some of the excess waste concerns? What are some other examples of voluntary actions by farmers to address these waste disposal concerns? Additionally, what does Ohio require of you?**

Ohio requires a Permit To Install (PTI) and a Permit To Operate (PTO) a Concentrated Animal Feeding Operation (CAFO). Permit and operating requirements are comprehensive and very detailed. Engineering requirements, operating records and programmatic requirements can be found at www.ohioagriculture.gov/lepp. Briefly, the PTI requires submission and approval of fully engineered site plans depicting surface drainage, storm water containment structures and all manure and wastewater storage structures. Further, requirements for on-site testing during construction by soils and design engineers and documentation of actual construction is rigorous. Bridgewater Dairy recently completed construction of two manure storage structures and modification of a third. On site testing and inspection costs during construction exceeded $ 25,000.

The PTO requires approved plans for Insect & Rodent Control, Manure Management (including a Comprehensive Nutrient Management Plan - CNMP for manure applications), a Mortality Management Plan and an Emergency Response Plan for damage to facilities, excessive animal mortality and manure spills. The PTI and the PTO permitting programs include a public participation process.

Operating records are required and site inspections by regulatory personnel are done three times annually. Operating records include:

Records of any discharges
Maintenance and calibration records of manure application equipment
Weekly inspection of manure storage facilities
Ground water laboratory analysis
Laboratory analysis of manure from each structure
Records for any manure distributed to neighboring farms or facilities
Land application records showing dates, amounts, fields, conditions, operators etc
Soil Laboratory analysis for each field
Nutrient budgets (projected and actual) to demonstrate no build-up of nutrients
Insect and rodent monitoring and control practices conducted

The annual records for Bridgewater Dairy LLC fill nine 2" thick 3-ring binders. Keeping of these records requires one full time position equivalent on Bridgewater Dairy.

The term "excess waste" is an interesting one, because a major emphasis of the PTO is to ensure that there is no excess waste generated at a permitted facility – i.e. sufficient land has been identified in advance for utilization and distribution before a CAFO facility in Ohio can generate the waste.

Bridgewater Dairy LLC participates in the USDA Conservation Reserve Program and the Conservation Reserve Enhancement Program to establish buffer strips along streams and rivers, and in the recently launched USDA Conservation Security Program that encourages proper management of soils, erosion, nutrients, pesticides and herbicides. Bridgewater's cropping programs emphasize use of organic rather than commercial fertilizers. This improves the tilth and productivity of our heavy clay soils and reduces nitrogen and phosphorous run-off even when compared to farming methods relying on commercial fertilizers.

Bridgewater Dairy LLC has also recently received a USDA grant to assist in construction of an anaerobic digestor to process dairy manure to generate electricity and carbon credits for trading with others. This plant, which will cost well over $ 3 million, to build will greatly reduce odor from land applied manure and will additionally produce manure solids that can be recycled for animal bedding. Bridgewater's anaerobic digester will be the first on a dairy in Ohio, but will be the sixth built by dairy producer members of our milk marketing coop (Continental Dairy Products) located in Indiana, Ohio and Michigan.

Bridgewater Dairy, like many CAFO's, is attentive to the need to own or control through contractual means a land base sufficient in size for the amount of manure produced. Additionally, we acquire existing nearby rural residences (if they become available) to further establish buffer zones between the production facility and rural neighbors. These property acquisition activities have had a positive effect on real estate values in close proximity to the dairy when compared to similar sales several miles away. It is interesting to note that new rural residences continue to be constructed within a two mile radius of our dairy- suggesting that being next to our large livestock facility is to some a preferred choice.

2. **You state farmers are already subject to environmental regulation related to manure management and that your dairy is required to record and monitor the levels of phosphorus in the ground on which you spread manure. Can you further explain how the nutrient management plans address these issues, as well as other potential contamination land use issues, and how these records are maintained? Can you please explain how this record keeping addresses your manure management issues?**

   Each winter a crop and fertilization plan is developed for each field. This involves several steps. First, a crop (e.g. corn, alfalfa, wheat or soybeans) is chosen based upon the crop rotation scheme submitted by Bridgewater Dairy and approved by Ohio in the PTO. Second, information about soil nutrient concentrations are obtained from soil test reports of the field and nutrient requirements of the crop, which are available from scientifically, published data and projected crop yields. These data are used to develop a fertilization plan for each specific field (actually separate, multiple plans are developed for distinctly different portions of each field) using the organic nutrients in manure plus commercial fertilizer (if necessary) to meet the requirements of the crop. Global-Position Satellite technology is utilized in implementing these practices. In addition we do plant tissue ant soil nutrient testing while the plant is growing to assess adequacy of nutrients. These procedures, although rigorous and costly, allow us to prevent excessive application of nutrients without creating plant nutrient deficiencies and retarding yields. Historically, agronomists prevented plant deficiencies by over application of nutrients using fertilizer. Our program does not do this.

Amounts of nutrients added to the soil are tabulated as they are applied in spring and summer and the amount of crop harvested (and the nutrients in the crop) is measured and recorded at harvest. From these data it can be determined whether the planned nutrient program was followed and whether nutrient balance was actually achieved. These plans, tests, measurements and calculations are all a part of our Comprehensive Nutrient Management Plan Record.

A potential source of contamination from use of manure as fertilizer is from surface water and drainage tile run-off. Bridgewater dairy LLC prevents surface runoff by following Ohio mandated rules concerning application setbacks, application rates and manure incorporation methods. Tiles are monitored and plugged as necessary to prevent subsurface run-off during application of liquid manure. Manure is not applied on wet soils or on frozen ground (making the manure application "seasons" essentially April-May and July-November) nor when a significant probability of rainfall is forecast within 24 hrs. Beginning in 2006, Bridgewater Dairy will use a $ 1 million solids separation facility to produce manure solids that can be spread with little chance of runoff. This will reduce the volume of liquid manures to be applied by 30%.

3. Can you please further explain your argument regarding how petroleum based fertilizers are exempt from CERCLA and EPCRA, but if these chemicals pass through an animal and are re-deposited on the land as the "hazardous substance" manure under this interpretation, they would be considered Superfund releases? How does that make sense?

This could occur depending upon the definition of "normal application of fertilizer" – which is exempt. The classification of application of manure as "not normal" and petroleum based fertilizer as "normal" is capricious. Farmers have land applied manure as fertilizers for millennia while petroleum based fertilizers have been extensively used for less than a century. My Amish neighbors and organic farming competitors certainly consider use of manure for fertilizer as not only normal and usual, but preferable. Further, as I have outlined above, application of fertilizer in the form of manure produced on highly regulated CAFO's such as Bridgewater Dairy is now more agronomically and environmentally sound than any application of manure on a 19th or 20th Century Farm ever was.

We sometimes "joke" that cow manure is just feed and water that has been processed through the cow. To define use of cow manure as "not normal application of fertilizer" suggests that the petroleum derived nitrogen and phosphorus that were incorporated into corn, alfalfa and soybean plants were somehow chemically altered inside the cow to render these elements more hazardous when passed in feces. This assertion is contradicted by voluminous research published in refereed, scientific journals.

Forgive my offering an opinion, but the concern should be about fertilizer application rates and methods – whatever the nutrient source. To identify large livestock farms and/or manure separately from commercial fertilizer suggests concerns about something not included on the hazardous materials list associated with CERCLA and EPCRA.

4. Can you discuss what went into your motivations for signing onto the Air Consent Agreement? What do you consider the benefits to this agreement and would they change if a legislative clarification were enacted?

Bridgewater Dairy LLC signed for two reasons: (1) to encourage the development of scientifically sound and peer reviewed criteria as the basis for air emission regulations and (2) to protect our substantial investment in Bridgewater Dairy LLC from penalties that might be assessed for time periods before there were defined, scientifically sound criteria.

Bridgewater Dairy LLC (and our "sister" producers in Continental Dairy Products) will continue in the Air Consent Agreement in the event a legislative clarification is enacted.

We are not afraid of the investments necessary to enhance the environmental as long as regulations are based upon sound science and available technology and are fairly promulgated in advance of enforcement. We all benefit when the environment is improved, and the environment can only be improved when technology exists and is adopted (as necessary) by all producers regardless of size. A ton of pollution is the same amount of pollution whether it comes from a small farm or a large farm. Regulations exempting the same amount of pollution from a small farm but not a large farm have an agenda about something other than cleaning up the environment.

The Honorable Charles F. Bass

1. **I would like to hear from all of you how you view the relationship between the Super Fund Law and the provisions of the Clean Air Act and Water Quality Laws regarding dairy (livestock etc.) operations? Aren't dairy and other operations already covered by the Clean Air Act and Water Quality Laws? If so, then why is it necessary to link animal manure to hazardous waste if it already is going to have to comply with other federal laws in place?**

That is correct. Livestock operations are already covered by the Clean Air Act and Water Quality Laws.

I believe well meaning people and organizations have proposed applying hazardous waste reporting and penalties to application of animal manure as fertilizer out of frustration. They are frustrated when they observe uneven development and implementation of CAFO rules and regulations within and among states. They are frustrated with the sometimes too slow pace of regulation development and implementation. They are frustrated when a rural landscape barely viable for agricultural production and ripe for suburban and rural development suddenly becomes viable as an economically sustainable (i.e. profitable) agricultural enterprise that competes with their alternative "higher" use for the land. They are worried about odors, road traffic and land values as well as surface water pollution. They do not understand the need for this nation to be globally competitive in food production and how this need dictates an agriculture that looks different from the low capital and high (and poorly compensated) labor model associated with a bygone era. These agricultural/ land development use conflicts occur wherever large projects are proposed whether they be large farms, large retail centers, large churches, airports or factories. We must recognize that this is at least in part a land use issue that is critical to the future of our nation.

The problem is that implementation of CAFO rules and regulations and enforcement activities are not fully matured and implemented in every geographic area. The solution, I believe, is to complete this process as expeditiously as possible. The CAFO rules we currently operate under work to protect the environment as defined by the clean water and clean air acts. Furthermore they are an evolving, maturing body of regulations that reflect the current state of science and available technology thereby allowing producers to adapt, evolve and improve their operations while remaining financially viable for the long-term. Further they create a "level playing field" for producers to compete in achieving efficient, environmentally safe production.

Use of the Super Fund reporting and penalty system is counterproductive to all those objectives because it appropriates a tool designed for different substances, quantities and uses and because it would draw an arbitrary distinction about the hazardous nature of an element based upon its origin (i.e. petroleum vs. organically derived). The recognition that storage and application of fertilizers for agriculture were not envisioned by the act is clear in the existing act. Legislative clarification of nutrients in livestock manure as normal fertilizer is the only environmentally and scientifically defensible decision and will preserve the original intent of the act.

There is a 150 year history of animal agriculture implementing new technologies researched by land grant universities and regulated by government to achieve unsurpassed agricultural productivity, abundant, safe food and an ever-increasing more pristine environment. We must give this proven system full opportunity to work rather than be tempted by the appropriation of a contrived and BIG Hazardous Waste hammer designed for use against industrial, corporate giants with many millions of net worth. Even the largest of most dairy farms remain family farms that could never survive the penalty or investment structure commonly associated with a superfund action. The result of such a linkage would be to put competitive animal agriculture out of business in our country. Relying on third world countries for our food supply should be as exciting as being dependent on them for petroleum.

2. **The funding levels for the Environmental Quality Incentives Program (EQIP) have been increased, but are still not at adequate funding levels to cover many of the projects. For example in NH, the state received $1.79million in EQIP funds but already has a backlog of $1.41million in requests for projects it can't fund. With the uncertainty of agriculture programs in light of recent budgetary efforts and the upcoming 2007 farm bill, my questions is without a substantial increase in this program will producers be able to get their operations in compliance?**

   Good Point. These funds must be viewed as an essential catalyst for capital improvements. They are especially valuable to growing operations to enable leveraging of their financial resources to make the enhancements necessary to address environmental concerns. The process of capturing and using these funds is a great illustration of how a producer could get in a financial squeeze through pressure from the superfund act – i.e. EQUP funds take many months or even years to obtain and spend. Would we prefer that a smaller or growing producer needing these funds be forced out of business while he waits for these funds?

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. **What size dairy herd would likely trigger the reporting requirements for ammonia and hydrogen sulfide of 100 pounds per day?**

   Herd size triggering reporting requirements for Nitrogen could be as few as 100 cows and will likely be less than 500 cows. Hydrogen Sulfide emissions are unstudied and unknown.

2. **Have any penalties ever been assessed against a dairy operation for failure to report under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or the Emergency Planning and Community Right to Know (EPCRA) as a result of a citizen's suit? If so, please provide the amount and the name of the case.**

   I cannot provide a comprehensive answer to this question. However, I am aware of at least one case filed in Idaho in 2003 (Idaho Conservation League vs. Desert Rose Dairy). It is my understanding that this case was settled, but at great legal cost.

   This case illustrates the grave threat to large and small agricultural operations under this act. In the Conservation League's "Intent to File Suit" letter they stated ..." as the courts have held, one of the principal purposes of the notice requirement ... is to allow the parties to discuss resolution of claims short of litigation". They continued, "We wish to emphasize our interest in finding creative solutions to this conflict... we would be happy to discuss possible settlement arrangements with you...".

   Out in the country where most producers live – that kind of an offer is called (in polite company) a "shakedown". How many episodes of legal fees and "settlements" can even a larger operation like Bridgewater Dairy survive? We don't have a legal staff, only a clerical staff of one! We don't even have paid business & farm managers that can run our business while we attend to legal matters. Pity the unfortunate "family farmer" with a few hundred cows and a little high school and family help who is challenged by such civil litigation! This will surely happen as family farmers in the Mid-West are often getting as much intense heat on these issues as are CAFO's.

   I am also aware of several circumstances in Ohio where citizens groups threatened producers in a similar way and then offered to "settle" by agreeing to design and operating conditions for the dairy that differed from those approved by the state of Ohio! At least one producer capitulated to this demand because he could not afford to fight as he had already invested his capital in conformance with the state approved facility permits. This producer is now in the unenviable position of being effectively permitted and inspected by a citizens committee! We don't believe that to be an economically viable business model.

3. Do you believe "manure" should be treated the same as petroleum-based fertilizers for the purpose of CERCLA?

If the concern is about environmental hazards, then the original source of the substance is irrelevant. This is especially true with regard to elements in manure vs. from petroleum derived commercial fertilizer.

Elements in commercial, petroleum derived fertilizer have the same opportunity to build up and wash off the land, as do the same elements in manure. Elements in manure come from plants (crops) that substantially extracted these elements from commercial fertilizer.

Classifying elements in commercial fertilizer and manure differently requires embracing one or more of the following confused logics:

1. Phosphorus and nitrogen in commercial fertilizer do not run off of wet fields or out of draining tiles, but phosphorus and nitrogen in manure do run off of wet fields or out of draining tiles.

2. Phosphorus and nitrogen in commercial fertilizer are not harmful if they run off fields, but phosphorus and nitrogen in manure are harmful if they run off fields.

3. Source of the element is more important than soil concentrations, application rates and methods.

4. Source of the element is more important than run-off potential.

5. Elements taken up by plants somehow become more hazardous when eaten by animals and passed in their feces.

These arguments are not sustainable.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel.
W.A. DREW EDMONDSON, in his
capacity as ATTORNEY GENERAL OF
THE STATE OF OKLAHOMA and
OKLAHOMA SECRETARY OF THE
ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR
NATURAL RESOURCES FOR THE
STATE OF OKLAHOMA,

Plaintiff,

v.

1. TYSON FOODS, INC.,
2. TYSON POULTRY, INC.,
3. TYSON CHICKEN, INC.,
4. COBB-VANTRESS, INC.,
5. AVIAGEN, INC.,
6. CAL-MAINE FOODS, INC.,
7. CAL-MAINE FARMS, INC.,
8. CARGILL, INC.,
9. CARGILL TURKEY
PRODUCTION, LLC,
10. GEORGE'S, INC.,
11. GEORGE'S FARMS, INC.,
12. PETERSON FARMS, INC.,
13. SIMMONS FOODS, INC., and
14. WILLOW BROOK FOODS, INC.,

Defendants.

Case No. 4:05-cv-00329-JOE-SAJ
JURY TRIAL DEMANDED

LCvR3.1 Statement: This action is
related to City of Tulsa v. Tyson
Foods, Inc., 01-CV-0900-EA(C)

FIRST AMENDED COMPLAINT

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, and alleges as follows:

I. NATURE OF THE CASE

1. Millions of chickens and turkeys, owned by the Poultry Integrator Defendants, are raised annually on thousands of farms throughout the Illinois River Watershed (the "IRW"), and include, without limitation, birds raised for food products ("broilers"), birds raised for egg production ("layers") and birds raised for breeding and resupply purposes ("breeders" and "pullets"). These "poultry growing operations" result in the generation of hundreds of thousands of tons of poultry waste for which the Poultry Integrator Defendants are legally responsible. It has been, and continues to be, the Poultry Integrator Defendants' practice to store and dispose of this waste on the lands within the IRW -- a practice that has caused injury to the IRW, including the biota, lands, waters and sediments therein. The Poultry Integrator Defendants are responsible for this injury. Accordingly, pursuant to federal and state law, the State of Oklahoma brings this action against the Poultry Integrator Defendants seeking, *inter alia,* abatement of these practices, expenses for assessing the injury and damage to the IRW (including the biota, lands, waters and sediments therein) caused by these practices, remediation of the injury to the IRW (including the lands, waters and sediments therein) caused by these practices, damages for the lost value and restoration of the natural resources of the IRW caused by these practices, and equitable relief.

II. JURISDICTION & VENUE

2. The State of Oklahoma is asserting claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* and the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6972. The State of Oklahoma is, further, asserting claims under the federal common law of nuisance. As such, this Court has jurisdiction over the subject matter of this lawsuit pursuant to 28 U.S.C. § 1331, 42 U.S.C. §

9613(b) and 42 U.S.C. § 6972(a). This Court has supplemental jurisdiction over the state law claims being asserted herein pursuant to 28 U.S.C. § 1367.

3. The State of Oklahoma has suffered injury to the IRW, including the biota, lands, waters and sediments therein, as a result of the Poultry Integrator Defendants' wrongful acts and omissions. The IRW, including the lands, waters and sediments therein, is situated, in part, in the Northern District of Oklahoma. As such, venue is proper in this Court pursuant to 42 U.S.C. § 9613(b). Additionally, the alleged endangerment giving rise to the State of Oklahoma's claim under the SWDA has occurred, in part, in the Northern District of Oklahoma. As such, venue is also proper in this Court pursuant to 42 U.S.C. § 6972(a). Further, a substantial part of the events or omissions giving rise to the claims being asserted herein occurred within the Northern District of Oklahoma, and a substantial part of the property that is the subject to the action is situated in the Northern District of Oklahoma. As such, venue is also proper in this Court pursuant to 28 U.S.C. § 1391(b).

4. Personal jurisdiction is properly exercised over each of the Poultry Integrator Defendants named herein in that each has engaged in acts or omissions within and outside of Oklahoma that have injured the IRW, including the biota, lands, waters and sediments therein, in Oklahoma and / or has deliberately engaged in significant activities in Oklahoma amounting to continuous and systematic contacts with Oklahoma. *See* Fed. R. Civ. P. 4(e), (k).

III. THE PARTIES

A. Plaintiff

5. The State of Oklahoma is a sovereign state of the United States. The State of Oklahoma, without limitation, has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams. Additionally, the State of Oklahoma

holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public. The State of Oklahoma, by and through its Attorney General, brings this action on its own behalf and as parens patriae on behalf of the residents of Oklahoma. Attorney General W.A. Drew Edmondson, as chief law officer of the State of Oklahoma, possesses complete dominion over every litigation in which he properly appears in the interest of the State of Oklahoma, whether or not there is a relator or some other nominal party. Oklahoma Secretary of the Environment C. Miles Tolbert is the duly appointed trustee for natural resources for the State of Oklahoma under CERCLA.

B. Poultry Integrator Defendants

6. Poultry Integrator Defendant Tyson Foods, Inc. is a Delaware corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Tyson Foods, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Tyson Foods, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

7. Poultry Integrator Defendant Tyson Poultry, Inc. is a Delaware corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Tyson Poultry, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope

of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Tyson Poultry, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

8. Poultry Integrator Defendant Tyson Chicken, Inc. is a Delaware corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Tyson Chicken, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Tyson Chicken, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

9. Poultry Integrator Defendant Cobb-Vantress, Inc. is a Delaware corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Cobb-Vantress, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Cobb-Vantress, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

10. Poultry Integrator Defendant Aviagen, Inc. is a Delaware corporation with its principal place of business in Alabama. At times pertinent to this complaint, Poultry Integrator Defendant Aviagen, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Aviagen, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

11. Poultry Integrator Defendant Cal-Maine Foods, Inc. is a Delaware corporation with its principal place of business in Mississippi. At times pertinent to this complaint, Poultry Integrator Defendant Cal-Maine Foods, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Cal-Maine Foods, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

12. Poultry Integrator Defendant Cal-Maine Farms, Inc. is a Delaware corporation with its principal place of business in Mississippi. At times pertinent to this complaint, Poultry Integrator Defendant Cal-Maine Farms, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the

business of Poultry Integrator Defendant Cal-Maine Farms, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

13. Poultry Integrator Defendant Cargill, Inc. is a Delaware corporation with its principal place of business in Minnesota. At times pertinent to this complaint, Poultry Integrator Defendant Cargill, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Cargill, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

14. Poultry Integrator Defendant Cargill Turkey Production, LLC is a Delaware corporation with its principal place of business in Minnesota. At times pertinent to this complaint, Poultry Integrator Defendant Cargill Turkey Production, LLC, individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Cargill Turkey Production, LLC, has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

15. Poultry Integrator Defendant George's, Inc. is an Arkansas corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant George's, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant George's, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

16. Poultry Integrator Defendant George's Farms, Inc. is an Arkansas corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant George's Farms, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant George's Farms, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

17. Poultry Integrator Defendant Peterson Farms, Inc. is an Arkansas corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Peterson Farms, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the

business of Poultry Integrator Defendant Peterson Farms, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

18. Poultry Integrator Defendant Simmons Food, Inc. is an Arkansas corporation with its principal place of business in Arkansas. At times pertinent to this complaint, Poultry Integrator Defendant Simmons Food, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Simmons Food, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

19. Poultry Integrator Defendant Willow Brook Foods, Inc. is a Missouri corporation with its principal place of business in Missouri. At times pertinent to this complaint, Poultry Integrator Defendant Willow Brook Foods, Inc., individually and / or by and through its duly authorized agents, servants, employees and / or contractors who were and are acting in the course and scope of their agency, servitude, employment and / or contracts and in the furtherance of the business of Poultry Integrator Defendant Willow Brook Foods, Inc., has been engaged in poultry growing operations in the IRW, and is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW and the resultant injury to the IRW, including the biota, lands, waters and sediments therein.

20. Defendants named above are collectively referred to as the "Poultry Integrator Defendants."

21. Unless otherwise noted, each and every count alleged herein applies to each and every Poultry Integrator Defendant.

IV. FACTUAL ALLEGATIONS

A. The Illinois River Watershed

22. The 1,069,530-acre Illinois River Watershed ("IRW") straddles the Oklahoma-Arkansas border. The approximately 576,030 acres of the IRW that are located in Oklahoma include portions of Delaware, Adair, Cherokee and Sequoyah counties. *See* Exhibit 1.

23. Within the IRW are the Illinois River, as well as its major tributaries, the Baron (a/k/a Barren) Fork River, the Caney Creek and the Flint Creek. Approximately 70 miles of the Illinois River have been designated by the Oklahoma Legislature as a Scenic River Area. Additionally, approximately 35 miles of the Barren Fork River and approximately 12 miles of the Flint Creek have been designated by statute as Scenic River Areas.

24. The designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers and streams "possess such natural scenic beauty, water conservation, fish, wildlife and outdoor recreation values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma."

25. The Illinois River and its tributaries are viewed as outstanding water resources for, *inter alia,* recreation, fish and wildlife propagation and aesthetic values.

26. The Illinois River feeds into the 12,900 acre Tenkiller Ferry Lake, which has been described as "the emerald jewel in Oklahoma's crown of lakes."

27. Among the recreational uses for which the resources of the Illinois River, its tributaries, Tenkiller Ferry Lake and the adjoining lands have been justly noted are floating (canoes, kayaks and rafts), fishing, camping, swimming, diving, hiking and sightseeing.

28. Additionally, the waters of the IRW have been used, and are used, and may in the future be used as a source of drinking water.

29. In recent years these resources have been and are continuing to be polluted and degraded, and their uses have been and are continuing to be injured and impaired.

30. This pollution of and injury to the IRW, including the biota, lands, waters and sediments therein, are indivisible.

31. The Poultry Integrator Defendants, by virtue of their improper poultry waste disposal practices, are responsible for this pollution of, as well as the degradation of, impairment of and injury to the IRW, including the biota, lands, waters and sediments therein.

B. The Poultry Integrator Defendants' Domination and Control of the Actions and Activities of Their Respective Poultry Growers

32. Each of the Poultry Integrator Defendants is in the business of producing poultry and / or poultry products for sale and use / consumption in the United States and internationally.

33. Each of the Poultry Integrator Defendants is intimately involved in and controls each stage of the poultry growing process.

34. Each of the Poultry Integrator Defendants raises its birds itself and / or contracts with "growers" to raise its birds.

35. The contracts establishing the growing arrangements between the respective Poultry Integrator Defendants and their poultry growers are presented to the poultry growers with no opportunity to negotiate their essential terms, and constitute contracts of adhesion.

36. Under the terms of a typical contract for broilers, for example, a poultry grower agrees to raise to adulthood a flock of chicks and / or poults belonging to a respective Poultry Integrator Defendant.

37. Each of the Poultry Integrator Defendants supplies the chicks and / or poults to its respective poultry growers, and picks up the birds from its respective poultry growers when the birds reach maturity.

38. The birds are owned by the respective Poultry Integrator Defendants throughout the entire growing process.

39. Additionally, each of the respective Poultry Integrator Defendants formulates, provides and owns the feed that is fed to its birds during the growing process. The constituents found in poultry waste are influenced by the feed formulas.

40. Further, each of the Poultry Integrator Defendants dictates to its respective poultry growers all aspects of the care and handling for its birds. Specifically, each of the Poultry Integrator Defendants dictates to its respective poultry growers, without limitation:

a. the type of the buildings, equipment and other facilities used in the poultry grower's operation;

b. the feed to be fed to the birds;

c. the feed supplements to be fed to the birds;

d. the medications and vaccinations to be provided to the birds; and

e. the environmental conditions under which the birds are raised.

41. During the growing process, each of the Poultry Integrator Defendants makes numerous periodic site visits to its respective poultry growers' poultry growing operations to ensure compliance with its dictates regarding the care and handling of its birds.

42. Each of the Poultry Integrator Defendants is similarly intimately involved in and controls each stage of the poultry growing process with respect to layer, breeder and pullet growing operations.

43. In sum, each of the Poultry Integrator Defendants so dominates and controls the actions and activities of its respective poultry growers that the relationship is not one of independent contractor, but rather one of employer and employee or one of principal and agent, and one of owner, operator or arranger of poultry waste under CERCLA.

44. Alternatively, even should the relationship with the Poultry Integrator Defendants be one of independent contractor, the Poultry Integrator Defendants have known and have had reason to know that in the ordinary course of the poultry growers raising birds in the usual and prescribed manner poultry waste will be handled and disposed of in such a manner to cause injury to the IRW, including the biota, lands, waters and sediments therein, and therefore the Poultry Integrator Defendants are legally responsible for their respective poultry growers' poultry waste and its environmental impacts.

45. Additionally, many of the Poultry Integrator Defendants themselves own poultry growing operations. At these operations, too, the respective Poultry Integrator Defendants control all aspects of the care and handling of the birds and are, therefore, owners, operators or arrangers of poultry waste under CERCLA.

C. The Poultry Integrator Defendants' Poultry Waste Generation

46. Poultry growing operations within the IRW are estimated to generate hundreds of thousands of tons of poultry waste per year.

47. Because each of the respective Poultry Integrator Defendants at all times owns its birds being raised within the IRW, because each of the respective Poultry Integrators at all times

formulates and owns the feed being fed to its birds being raised within the IRW, and because each of the respective Poultry Integrator Defendants at all times so dominates and controls the actions and activities of its respective poultry growers with respect to the growing of its birds as well as controlling its own poultry growing operations, the Poultry Integrator Defendants are responsible for the safe handling and disposal of the poultry waste generated in the course of the poultry growing operations associated with their respective birds.

D. The Poultry Integrator Defendants' Improper Poultry Waste Disposal Practices and Their Impact

48. Each of the Poultry Integrator Defendants has long known that it has been and continues to be the practice to routinely and repeatedly improperly store the poultry waste generated in the course of its respective growing operations on lands within the IRW. *See, e.g.,* Exhibit 2.

49. Each of the Poultry Integrator Defendants has long known that it has been and continues to be the practice to dispose of the poultry waste generated in the course of its respective growing operations by routinely and repeatedly applying it to lands within the IRW. *See, e.g.,* Exhibit 3.

50. Each of the Poultry Integrator Defendants has long known that the application of poultry waste to lands within the IRW, in the amounts that it is applied, is in excess of any agronomic need and is not consistent with good agricultural practices and, as such, constitutes waste disposal rather than any normal or appropriate application of fertilizer.

51. Each of the Poultry Integrator Defendants has long known that the application of its poultry waste to lands within the IRW, in the amounts that it is applied and with the frequency that it is applied, far exceeds the capacity of the soils and vegetation to absorb those nutrients present in the poultry waste.

52. Each of the Poultry Integrator Defendants has long known that these poultry waste disposal practices lead to the run-off and release of large quantities of phosphorus and other hazardous substances, pollutants and contaminants in the poultry waste onto and from the fields and into the waters of the IRW.

53. Each of the Poultry Integrator Defendants has long known that the application of poultry waste to lands within the IRW causes large quantities of phosphorus and other hazardous substances, pollutants and contaminants to accumulate in the soils. At many locations, phosphorus and other hazardous substances, pollutants and contaminants have built up in the soil to such an extent that, even without any additional application of poultry waste to the land, the excess residual phosphorus and other hazardous substances, pollutants and contaminants will continue to run-off and be released into the waters of the IRW in the future.

54. Despite this knowledge, each of the Poultry Integrator Defendants has, by virtue of its contracts, arranged for its respective growers to take possession of the poultry waste coming from its birds. Each of the Poultry Integrator Defendants has made this arrangement with full knowledge that the growers were annually placing hundreds of thousands of tons of their poultry waste directly on the ground and that these actions would lead to the run off and release of phosphorus and other hazardous substances, pollutants and contaminants into the lands and waters of the IRW.

55. Simply put, each of the Poultry Integrator Defendants has long known that poultry waste is an enormous contributor to phosphorus and other pollution in the IRW. Nevertheless, each of the Poultry Integrator Defendants continues to allow large amounts of its respective poultry waste to be improperly stored and applied on lands within the IRW each year (hereinafter "poultry waste disposal practices").

56. The Poultry Integrator Defendants' poultry waste disposal practices are not, and have not been, undertaken in conformity with federal and state laws and regulations.

57. In sum, each of the Poultry Integrator Defendants has long known that such poultry waste disposal practices present the threat that constituents of poultry waste will run off and be released into and from the land to which the poultry waste is applied thereby potentially adversely impacting the IRW, including the biota, lands, waters and sediments therein, and that such practices have in fact resulted in constituents of poultry waste running off and being released into and from the land to which the poultry waste is applied thereby adversely impacting the IRW, including the biota, lands, waters and sediments therein.

58. Each of the Poultry Integrator Defendants has long known that poultry waste contains a number of constituents that can and do cause harm to the environment and pose human health hazards. These constituents include, but are not limited to:

a. phosphorus / phosphorus compounds;
b. nitrogen / nitrogen compounds;
c. arsenic / arsenic compounds;
d. zinc / zinc compounds;
e. copper / copper compounds;
f. hormones; and / or
g. microbial pathogens.

59. The lands and waters in the IRW in fact contain elevated levels of a number of such constituents.

60. The elevated levels of such constituents in the IRW, including in the lands, waters and sediments therein, as well as the resultant injury to the IRW, including the biota, lands,

waters and sediments therein, have been caused by the Poultry Integrator Defendants' improper poultry waste disposal practices.

61. Phosphorus / phosphorus compounds and nitrogen / nitrogen compounds have been designated as hazardous substances under CERCLA. Elevated levels of phosphorus / phosphorus compounds, as well as elevated levels of nitrogen / nitrogen compounds, can cause periodic algae blooms, excessive algal growths, hypolimnetic anoxia and other adverse impacts, and have in fact caused periodic algae blooms, excessive algal growths, hypolimnetic anoxia and other adverse impacts in the waters of the IRW, resulting in eutrophication, a degradation in water quality and sediments, injury to biota and impaired uses. *See, e.g.,* Exhibit 4.

62. Certain arsenic / arsenic compounds, zinc / zinc compounds, and copper / copper compounds are also designated as hazardous substances under CERCLA. Elevated concentrations of arsenic, for example, have been shown to cause cancer, as well as adverse effects to the gastrointestinal tract, the cardiovascular system, blood, the liver, the lungs, skin and the nervous system, in humans. Elevated concentrations of zinc have been shown to cause adverse effects to the gastrointestinal tract and blood in humans. Elevated concentrations of copper have been shown to cause adverse effects to the gastrointestinal tract in humans. Additionally, elevated concentrations of these metals may be toxic to sensitive terrestrial, aquatic and sediment species.

63. Elevated levels of hormones, including estradiol, in rivers, streams and lakes cause -- even in very low concentrations -- adverse effects on the reproductive biology of fish and other aquatic vertebrate species.

64. Elevated levels of microbial pathogens, including e. coli and other coliforms, campylobacter, enterococci, yersinia, clostridium, salmonella and staphylococcus, are known to

be present in poultry waste. These microbial pathogens are toxic and can cause illness when they are ingested by human beings and biota.

E. The Reason for This Lawsuit

65. In a recent advertisement published in Oklahoma, certain of the Poultry Integrator Defendants admitted that one source of excess nutrients in the waters of eastern Oklahoma is poultry waste.

66. Additionally, in a recent open letter published to the citizens of Oklahoma, certain of the Poultry Integrator Defendants admitted that their poultry waste "potentially impact[s] the health of the rivers and streams that lie within [Oklahoma's Scenic River Watersheds]."

67. In that same open letter, certain of the Poultry Integrator Defendants further admitted that they "are prepared to do [their] part to take care of the poultry portions of the nutrient equation."

68. To date, however, the Poultry Integrator Defendants' actions have not matched this rhetoric. By comparison, other major industries in Oklahoma have long accepted responsibility for the proper management and disposal of wastes that are generated by their business so as not to cause any release to the environment.

69. Indeed, the Poultry Integrator Defendants continue with their improper poultry waste disposal practices to this day. Accordingly, the State of Oklahoma has been forced to bring this lawsuit against the Poultry Integrator Defendants to protect and restore the IRW, including the biota, land and waters therein.

V. CAUSES OF ACTION

A. Count 1: CERCLA Cost Recovery -- 42 U.S.C. § 9607

70. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

71. By and through the Poultry Integrator Defendants' activities and operations, "hazardous substances" within the meaning of CERCLA, 42 U.S.C. § 9601(14), including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds and arsenic and arsenic compounds, were disposed of in the IRW, including the lands, waters and sediments therein, resulting in "releases" and/or "threatened releases" of hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9601(22), into the IRW, including the lands, waters and sediments therein.

72. The IRW, including the lands, waters and sediments therein, constitutes a "site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . . ." and, as such, constitutes a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the "releases" and / or "threatened releases" of "hazardous substances" into the IRW, including the lands, waters and sediments therein, resulted.

73. Each of the Poultry Integrator Defendants is a "person" within the meaning of CERCLA, 42 U.S.C. § 9601(21).

74. The Poultry Integrator Defendants are covered persons within the meaning of CERCLA, 42 U.S.C. § 9607(a), in that they, individually and collectively, have arranged for the

disposal of their poultry waste which contains hazardous substances, including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds and arsenic and arsenic compounds, which has been released to and within the IRW, including the lands, waters and sediments therein, and these hazardous substances have been released within the IRW, including the lands, waters and sediments therein.

75. Additionally, the Poultry Integrator Defendants are covered persons within the meaning of CERCLA, 42 U.S.C. § 9607(a), in that they, individually and collectively, have been owners and / or operators during the time their poultry waste containing these hazardous substances was generated and disposed of and released into the IRW, including the lands, waters and sediments therein.

76. As a result of responding to these releases or threatened releases of hazardous substances by the Poultry Integrator Defendants into the IRW, including the lands, waters and sediments therein, the State of Oklahoma has incurred, and will continue to incur, necessary response costs in a manner consistent with the National Contingency Plan ("NCP"), or alternatively, in a manner not inconsistent with the NCP. These costs include, but are not limited to, costs of monitoring, assessing and evaluating water quality, wildlife and biota in the IRW.

77. Accordingly, the State of Oklahoma is entitled to recover from the Poultry Integrator Defendants, jointly and severally, all of the State of Oklahoma's past and present necessary response costs under CERCLA § 107. Further, the State of Oklahoma is entitled to a declaratory judgment holding the Poultry Integrator Defendants liable, jointly and severally, for all future necessary response costs incurred by the State of Oklahoma.

B. Count 2: CERCLA Natural Resource Damages -- 42 U.S.C. § 9607

78. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

79. The Oklahoma Secretary of the Environment, acting on behalf of the State of Oklahoma, is the designated CERCLA trustee for "natural resources" in, belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the State of Oklahoma and shall assess damages to natural resources for purposes of CERCLA for those natural resources under their trusteeship.

80. By and through the Poultry Integrator Defendants' activities and operations, "hazardous substances" within the meaning of CERCLA, 42 U.S.C. § 9601(14), including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds and arsenic and arsenic compounds, were disposed of in the IRW, including the biota, lands, waters and sediments therein, resulting in "releases" and/or "threatened releases" of hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9601(22), into the IRW, including the lands, waters and sediments therein.

81. The IRW, including the lands, waters and sediments therein, constitutes a "site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . . ." and, as such, constitutes a "facility" within the meaning of CERLCA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the "releases" and / or "threatened releases" of "hazardous substances" into the IRW, including the lands, waters and sediments therein, resulted.

82. Each of the Poultry Integrator Defendants is a "person" within the meaning of CERCLA, 42 U.S.C. § 9601(21).

83. The Poultry Integrator Defendants are covered persons within the meaning of CERCLA, 42 U.S.C. § 9607(a), in that they, individually and collectively, have arranged for the disposal of their poultry waste which contains hazardous substances, including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds and arsenic and arsenic compounds, which has been released to and within the IRW, including the lands, waters and sediments therein, and these hazardous substances have been released within the IRW, including the lands, waters and sediments therein.

84. Additionally, the Poultry Integrator Defendants are covered persons within the meaning of CERCLA, 42 U.S.C. § 9607(a), in that they, individually and collectively, have been owners and / or operators during the time their poultry waste containing these hazardous substances was generated, disposed of and released into the IRW, including the lands, waters and sediments therein.

85. As a result of the release of hazardous substances by the Poultry Integrator Defendants into the IRW, including the lands, waters and sediments therein, there has been injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma.

86. This injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such

resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma is continuing.

87. The natural resources that have been and continue to be injured, destroyed, or lost as a result of the release of hazardous substances by the Poultry Integrator Defendants include, but are not limited to the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Oklahoma.

88. The State of Oklahoma has incurred reasonable and necessary costs to assess and evaluate this injury, destruction and loss of the natural resources.

89. Accordingly, the Poultry Integrator Defendants are jointly and severally liable to the State of Oklahoma and the Oklahoma Secretary of the Environment as trustee under CERCLA 107 for damages for injury to, destruction of, and loss of these natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, including but not limited to (a) the cost to restore, replace, or acquire the equivalent of such natural resources; (b) the compensable value of lost services resulting from the injury to such natural resources; and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages.

C. Count 3: SWDA Citizen Suit

90. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

91. On or about March 9, 2005, in accordance with the applicable federal statutes and regulations, the State of Oklahoma served its Notice of Intent to File Suit under the Solid Waste Disposal Act ("SWDA"), by registered mail, properly addressed and postage prepaid, to each of

the Poultry Integrator Defendants as well as the appropriate federal and state officials. A copy of this Notice is attached hereto as Exhibit 5.

92. Poultry waste is a solid and / or hazardous waste under the SWDA.

93. Each of the Poultry Integrator Defendants has in the past been or is now a generator of poultry waste and / or has in the past been or is now an owner or operator of a treatment, storage or disposal facility for poultry waste.

94. Each of the Poultry Integrator Defendants is a "person" under the SWDA who has contributed to and / or is contributing to the past or present handling, storage, treatment, transportation or disposal of poultry waste in the IRW and lands and waters therein.

95. An imminent and substantial endangerment to health or the environment may be presented and is in fact presented as a direct and proximate result of each of the Poultry Integrator Defendants' respective contribution to the handling, storage, treatment, transportation or disposal of poultry waste in the IRW and lands and waters therein.

96. Accordingly, the State of Oklahoma is entitled to an injunction restraining each and all of the Poultry Integrator Defendants from their respective pollution-causing conduct, to remediate the IRW and the lands and waters therein, and to take all such other action as may be necessary to abate the imminent and substantial endangerment to health or the environment.

97. Additionally, the State of Oklahoma is entitled to all appropriate civil penalties under the SWDA, as well as all costs of litigation (including reasonable attorneys and expert witness fees).

D. Count 4: State Law Nuisance

98. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

99. As a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally caused an unreasonable invasion of, interference with and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein, thereby causing the State of Oklahoma and the public inconvenience, annoyance, impairment of use, interference with enjoyment, and other injury. This unreasonable and intentional invasion of, interference with and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein, by the Poultry Integrator Defendants continues to this day.

100. Additionally, as a result of their poultry waste disposal practices, the Poultry Integrator Defendants' wrongful conduct has caused an unreasonable and substantial danger to the public's health and safety in the IRW, including the lands, waters and sediments therein. This unreasonable and substantial danger to the public's health and safety in the IRW, including the lands, waters and sediments therein, by the Poultry Integrator Defendants continues to this day.

101. Such conduct thereby constitutes a private and public nuisance under applicable state law. The nuisance and injuries caused thereby are substantial, tangible, continuing, and both temporary and permanent. The continuation of such conduct threatens irreparable harm.

102. The Poultry Integrator Defendants have at all times pertinent to this complaint known that an invasion of, interference with and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein, as well as the creation of an unreasonable and substantial danger to the public's health and safety, have resulted from, or have been substantially certain to result from, their wrongful poultry waste disposal practices.

103. Further, by statute, the Poultry Integrator Defendants' pollution of the waters within the IRW and placement / contribution to the placement of poultry wastes where they are likely to cause pollution of the IRW, including the lands, waters and sediments therein, constitute a public nuisance *per se* pursuant to 27A Okla. Stat. § 2-6-105.

104. Yet further, by statute, the Poultry Integrator Defendants are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act and, as such, their pollution of the land and waters within the IRW constitutes a public nuisance *per se* pursuant to 2 Okla. Stat. § 2-18.1.

105. By reason of the foregoing, the State of Oklahoma is entitled to equitable relief, including but not limited to an injunction requiring each and all of the Poultry Integrator Defendants to abate their pollution-causing conduct --including immediate cessation of all releases of poultry waste constituents to the soils and waters of the State of Oklahoma -- to remediate the IRW, including the lands, waters and sediments therein, and to pay all costs associated with quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself.

106. By reason of the foregoing, the State of Oklahoma has also incurred, and will incur in the future, damages, including special and direct damages, costs and expenses as a result of the nuisance for which it is entitled to receive compensation and reimbursement from the Poultry Integrator Defendants, jointly and severally.

107. Exemplary and punitive damages should also be awarded based on the Poultry Integrator Defendants' reckless and intentional indifference to and disregard of the public's health and safety in the IRW, including the lands, waters and sediments therein.

108. The State of Oklahoma is further entitled to reasonable attorneys fees, court costs and interest pursuant to 12 Okla. Stat. § 940.

E. Count 5: Federal Common Law Nuisance

109. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

110. As a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally carried on an activity that has caused and is causing an unreasonable invasion of, interference with, impairment to, inconvenience to, annoyance to and injury to the State of Oklahoma and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein.

111. Additionally, as a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally carried on an activity that has significantly threatened to cause and is significantly threatening to cause an unreasonable invasion of, interference with, impairment to, inconvenience to, annoyance to and injury to the State of Oklahoma and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein.

112. Furthermore, as a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally carried on an activity that has caused and is causing unreasonable and substantial danger to the public's health and safety in the IRW, including the lands, waters and sediments therein.

113. Additionally, as a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally carried on an activity that has significantly threatened to

cause and is significantly threatening to cause unreasonable and substantial danger to the public's health and safety in the IRW, including the lands, waters and sediments therein.

114. Such conduct thereby constitutes a nuisance under applicable federal law. The injuries caused thereby are substantial, tangible and continuing, and are both temporary and permanent. The continuation of such conduct threatens irreparable harm.

115. The Poultry Integrator Defendants have at all times pertinent to this complaint known that an invasion of, interference with and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters and sediments therein, as well as the creation of an unreasonable and substantial danger to the public's health and safety, have resulted from, or have been substantially certain to result from, their wrongful poultry waste disposal practices.

116. By reason of the foregoing, the State of Oklahoma is entitled to equitable relief, including but not limited to an injunction requiring each and all of the Poultry Integrator Defendants to abate their pollution-causing conduct, to remediate the IRW, including the lands, waters and sediments therein, and to pay all costs associated with quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself.

117. By reason of the foregoing, the State of Oklahoma has also incurred, and will incur in the future, damages, including special and direct damages, costs and expenses as a result of the nuisance for which it is entitled to receive compensation and reimbursement from the Poultry Integrator Defendants, jointly and severally.

118. Exemplary and punitive damages should also be awarded based on the Poultry Integrator Defendants' reckless and intentional indifference to and disregard of the public's health and safety in the IRW, including the lands, waters and sediments therein.

F. Count 6: Trespass

119. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

120. The Poultry Integrator Defendants' poultry waste disposal practices have resulted in an actual and physical invasion of and interference with the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein. This actual and physical invasion of and interference with the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein, by the Poultry Integrator Defendants is continuing.

121. The Poultry Integrator Defendants have known that their poultry waste disposal practices have resulted in or have been substantially certain to result in an actual and physical invasion of and interference with the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein, and thus have been and continue to be intentional.

122. This actual and physical invasion of and interference with the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein, by the Poultry Integrator Defendants have been, and continue to be, without authority or consent.

123. Such conduct thereby constitutes a trespass under applicable state law. The trespass and injuries caused thereby are substantial, tangible, continuing, and both temporary and permanent. The continuation of such conduct threatens irreparable harm.

124. By reason of the foregoing, the State of Oklahoma is entitled to equitable relief, including but not limited to an injunction requiring each and all of the Poultry Integrator Defendants to abate their pollution-causing conduct, to remediate the IRW, including the lands, waters and sediments therein, and to pay all costs associated with quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself.

125. By reason of the foregoing, the State of Oklahoma has also incurred, and will incur in the future, damages, costs and expenses as a result of the trespass for which it is entitled to receive compensation and reimbursement from the Poultry Integrator Defendants, jointly and severally.

126. Exemplary and punitive damages should also be awarded based on the Poultry Integrator Defendants' reckless and intentional indifference and harm to the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein, as well as their reckless and intentional disregard of the public's health and safety in the IRW, including the lands, waters and sediments therein.

127. The State of Oklahoma is further entitled to reasonable attorneys fees, court costs and interest pursuant to 12 Okla. Stat. § 940.

G. Count 7: Violation of 27A Okla. Stat. § 2-6-105 & 2 Okla. Stat. § 2-18.1

128. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

129. The Poultry Integrator Defendants, by and through their wrongful poultry waste disposal practices, have caused pollution of the waters in the IRW within Oklahoma. Each instance of this conduct constitutes a violation of 27A Okla. Stat. § 2-6-105.

130. Additionally, the Poultry Integrator Defendants, by and through their wrongful poultry waste disposal practices, have placed or caused to be placed poultry waste in locations where it is likely to cause pollution of the air, land and waters in the IRW in Oklahoma. Each instance of this conduct also constitutes a violation of 27A Okla. Stat. § 2-6-105.

131. Additionally, the Poultry Integrator Defendants are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act and, by and through their wrongful poultry waste disposal practices, have caused pollution of the land and waters within the IRW in Oklahoma. Each instance of this conduct constitutes a violation of 2 Okla. Stat. § 2-18.1.

132. Pursuant to 27A Okla. Stat. § 2-3-504 and 2 Okla. Stat. § 2-16, the State of Oklahoma is entitled to an assessment of civil penalties against the Poultry Integrator Defendants for each respective violation together with attorneys fees and costs associated with the collection of such civil penalties, injunctive relief against the Poultry Integrator Defendants compelling compliance with 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1, respectively, and all such other relief as may be provided for under the law.

H. Count 8: Violation of 2 Okla. Stat. § 10-9.7 and Oklahoma Administrative Code § 35:17-5-5

133. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

134. The Poultry Integrator Defendants' wrongful poultry waste disposal practices, by and through those practices that occurred in Oklahoma, have caused, among other things, the

runoff of poultry waste into the waters in the IRW within Oklahoma, contamination of the waters of the IRW within Oklahoma, and the creation of an environmental or public health hazard within Oklahoma. Each instance of this conduct constitutes a violation of the Animal Waste Management Plan criteria set forth in the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7, and of the Oklahoma Administrative Code, § 35:17-5-5.

135. Additionally, the Poultry Integrator Defendants, by and through their poultry waste disposal practices that occurred in Oklahoma, have caused, among other things, discharges or runoffs or releases of significant pollutants to the waters in the IRW in Oklahoma, contamination of the waters of the IRW within Oklahoma, and the creation of an environmental or public health hazard within Oklahoma. Each instance of this conduct also constitutes a violation of the Animal Waste Management Plan criteria set forth in the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7, and of the Oklahoma Administrative Code, § 35:17-5-5.

136. Pursuant to 2 Okla. Stat. § 10-9.11, the State of Oklahoma is entitled to an assessment of civil penalties against the Poultry Integrator Defendants for each violation together with attorneys fees and costs associated with the collection of such civil penalties, injunctive relief against the Poultry Integrator Defendants compelling compliance with the Animal Waste Management Plan criteria set forth in the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7, and with the Oklahoma Administrative Code, § 35:17-5-5, and all such other relief as may be provided for under the law.

I. Count 9: Violation of Oklahoma Administrative Code, § 35:17-3-14

137. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

138. The Poultry Integrator Defendants' wrongful poultry waste disposal practices, by and through those practices that occurred in Oklahoma, have caused the runoff of poultry waste resulting in a discharge to the surface and ground waters of the IRW within Oklahoma. Each instance of this conduct, to the extent the poultry waste disposal practice occurred on land owned or leased by the owner of a poultry growing operation subject to Oklahoma Concentrated Animal Feeding Operation Act, 2 Okla. Stat. § 9-200, *et. seq.*, constitutes a violation of the Animal Waste Management Plan criteria set forth in the Oklahoma Administrative Code, § 35:17-3-14.

139. Pursuant to 2 Okla. Stat. § 9-212, the State of Oklahoma is entitled to an assessment of civil penalties against the Poultry Integrator Defendants for each violation together with attorneys fees and costs associated with the collection of such civil penalties, injunctive relief against the Poultry Integrator Defendants compelling compliance with the Animal Waste Management Plan criteria set forth in the Oklahoma Administrative Code, § 35:17-3-14, and all such other relief as may be provided for under the law.

J. Count 10: Unjust Enrichment / Restitution / Disgorgement

140. The State of Oklahoma realleges and incorporates herein the foregoing allegations of this Complaint, and further alleges as follows:

141. The Poultry Integrator Defendants have engaged in improper poultry waste disposal practices, as described above.

142. By engaging in these improper poultry waste disposal practices, the Poultry Integrator Defendants have avoided the costs of properly managing and disposing of their poultry waste -- not only to their enormous economic benefit and advantage, but also at great cost to the lands and waters comprising the IRW and at the expense of, and in violation of, the State of Oklahoma's rights.

143. In fairness and equity, these are costs that should have been borne by the Poultry Integrator Defendants.

144. The State of Oklahoma has thereby conferred a benefit upon the Poultry Integrator Defendants.

145. This benefit has not been voluntarily conferred upon the Poultry Integrator Defendants by the State of Oklahoma.

146. The Poultry Integrator Defendants have knowingly retained this benefit and have, therefore, been unjustly enriched.

147. There exists no other remedy at law that can adequately compensate the State of Oklahoma for the entirety of the loss and damages it has suffered as a result of the Poultry Integrator Defendants' improper poultry waste disposal practices and pollution of the IRW, including the lands, waters and sediments therein, and therefore the State of Oklahoma is entitled to restitution from the Poultry Integrator Defendants. Further, the State of Oklahoma is entitled to disgorgement of all gains the Poultry Integrator Defendants realized in consequence of their wrongdoing.

VI. PRAYER FOR RELIEF

Wherefore, the State of Oklahoma and, where applicable, the Oklahoma Secretary of the Environment respectfully request that this Court enter judgment against the Poultry Integrator Defendants, jointly and severally, on each of the claims alleged above and award the following relief:

1. All past monetary damages suffered by and all costs and expenses incurred by the State of Oklahoma as a result of and in connection with the Poultry Integrator Defendants' past wrongful conduct;

2. A declaration that the Poultry Integrator Defendants are liable for all future monetary damages suffered by and all costs and expenses incurred by the State of Oklahoma as a result of and in connection with the continuing effects of the Poultry Integrator Defendants' past wrongful conduct;

3. A permanent injunction requiring each and all of the Poultry Integrator Defendants to immediately abate their pollution-causing conduct in the IRW, to remediate the IRW, including the lands, waters and sediments therein, to take all such actions as may be necessary to abate the imminent and substantial endangerment to the health and the environment, and to pay all costs associated with assessing and quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself;

4. Restitution in an amount sufficient to make the State of Oklahoma whole for the loss and damages it has suffered on account of the Poultry Integrator Defendants' improper poultry waste disposal practices and pollution of the IRW, including the lands, waters and sediments therein, as well as disgorgement of all gains the Poultry Integrator Defendants realized in consequence of their wrongdoing;

5. Punitive and exemplary damages, to the maximum extent allowable under the law;

6. Statutory penalties, to the maximum extent allowable under the law;

7. Prejudgment interest;

8. All attorneys fees and costs of suit (including but not limited to court costs, expert and consultant costs, and litigation and investigative expenses); and

9. All such other and further relief as is just and appropriate.

VII. JURY DEMAND

The State of Oklahoma requests a trial by jury on all issues so triable.

Respectfully submitted,

/S/

W.A. Drew Edmondson (OBA #2628)
Attorney General
State of Oklahoma
2300 North Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105
(405) 521-3921

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
(405) 530-8800

DATED: August 19, 2005

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

March 9, 2005

By Registered Mail, Return Receipt Requested

Aviagen, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 N. Robinson
Oklahoma City, OK 73102

Aviagen, Inc.
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

Cal-Maine Farms, Inc.
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

Cal-Maine Farms, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 N. Robinson
Oklahoma City, OK 73102

Cal-Maine Foods, Inc.
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

Cal-Maine Foods, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 North Robinson
Oklahoma City, OK 73102

Cargill, Incorporated
c/o registered service agent
The Corporation Company
735 First National Building
120 N. Robinson
Oklahoma City, OK 73102

Cargill, Incorporated
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

Cargill Turkey Production, L.L.C.
c/o registered service agent
The Corporation Company
735 First National Building
120 North Robinson
Oklahoma City, OK 73102

Cargill Turkey Production, L.L.C.
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

Cobb-Vantress, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 North Robinson
Oklahoma City, OK 73102

Cobb-Vantress, Inc.
c/o registered service agent
The Corporation Company
425 W. Capitol Ave.,Ste. 1700
Little Rock, AR 72201

George's Inc.
c/o registered service agent
James M. Graves
Bassett Law Firm
221 North College Avenue
Fayetteville, AR 72701

George's Farms, Inc.
c/o registered service agent
James M. Graves
Bassett Law Firm
221 North College Avenue
Fayetteville, AR 72701

Peterson Farms, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 N. Robinson
Oklahoma City, OK 73102

Peterson Farms, Inc.
c/o registered service agent
Ray Wear
250 South Main
Decatur, AR 72722

Simmons Foods, Inc.
c/o registered service agent
The Corporation Company
735 First National Building
120 N. Robinson
Oklahoma City, OK 73102

Simmons Foods, Inc.
c/o registered service agent
Mark C. Simmons
PO Box 430
Siloam Springs, AR 72761

4545 N. LINCOLN BLVD., SUITE 260, OKLAHOMA CITY, OK 73105-3498 (405) 521-4274 • FAX: (405) 528-1867

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Exhibit "5"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

FILED
MAR 29 2005
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______
DEPUTY

THE CITY OF WACO,
Plaintiff,

§
§
§
§
§ **CIVIL ACTION NO. W-04-CA-118**
§
§
§
§
§

DENNIS SCHOUTEN, ET AL.
Defendants.

MEMORANDUM OPINION AND ORDER

Broumley Dairy, Jim Broumley and Keith Broumley ("Defendants") have submitted a Motion to Dismiss, or, in the Alternative, to Transfer Venue pursuant to Federal Rule of Civil Procedure 12(b). Defendants make four arguments as to why Plaintiff's claims should be dismissed. First, Defendants argue that, although all claims which Plaintiff has asserted against them are properly venued in the Western District of Texas, the Court should nonetheless transfer the claims to the Northern District of Texas. Second, Defendants argue that the individual defendants who are alleged to have operated the dairies cannot be held liable under principles of corporate law and therefore must be dismissed. Third, Defendants argue that Plaintiff's claims under two environmental statutes have several defects which warrant dismissal. Finally, Defendants assert that Plaintiff's tort claims fail for several reasons. Having reviewed the Motion and the applicable legal authority, the Court finds that it should be denied.

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I. INTRODUCTION

The City of Waco ("Waco") filed suit in this Court against eight dairies on April 24, 2004. All eight of the original defendants operate dairies which are located in either Comanche County or Erath County. On May 27, 2004, Waco amended its complaint to add six additional diaries and their respective owners and operators. Three of the newly-added defendants operate dairies which are located in either Bosque County or Hamilton County.

On June 21, 2004, Waco filed a motion to voluntarily dismiss its Texas Water Code claim against all defendants. The Court granted Plaintiff's motion, and the Texas Water Code claims were dismissed on June 28, 2004. On September 30, 2005, the Court signed an order dismissing without prejudice all claims against Broumley Dairy, Jim Broumley, Keith Broumley. The same day, the Court signed an order dismissing with prejudice all claims against Ber Lengers and Harry DeWitt. Plaintiff filed its Second Amended Complaint on October 12, 2004. In this most recent complaint, Plaintiff alleges the following causes of action against all defendants: (1) cost of recovery or contribution under the federal Comprehensive Environmental Response, Compensation, and Recovery Act ("CERCLA"), (2) a "citizen suit" under the federal Clean Water Act ("CWA"), (3) cost of recovery or contribution under the Texas Solid Waste Disposal Act ("TSWDA"), (4) negligence, (5) negligence per se, and (6) trespass.

On November 15, 2004, the Court signed an order dismissing with prejudice all claims against Joost Smulders and Double S. Dairy, L.L.C. On January 7, 2005, the Court signed an order dismissing with prejudice all claims against Excel Dairy, Allen Vander Horst, the Mear Family Trust, Thomas Mear and Elanor Mear. On February 4, 2005, the Court signed two orders dismissing with prejudice all claims against Russell Carpenter, Russell Carpenter Dairy, J&L

Dairy, Jimmy Pack, Larry Pack, Alma Pack, Meine Huisman and Huisman Dairy.

II. MOTION TO DISMISS

A motion to dismiss under rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir.1986). The district court may not dismiss a complaint under rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This strict standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 WRIGHT & MILLER § 1357 (1996).

III. ANALYSIS

A. Dismissal or Transfer of CWA Claims

Pursuant to Fed.R.Civ.P. 12(b)(3), Defendants move to dismiss Plaintiff's complaint based on improper venue. Venue concerns the appropriate district court in which an action may be filed. *See N.L.R.B. v. Line*, 50 F.3d 311, 314 (5th Cir. 1995). Generally, in order for venue to be proper, it must be proper as to all defendants and all claims. 28 U.S.C.A. § 1391(a)(2).

There are two types of federal venue statutes: special venue statutes and 28 U.S.C. § 1391. The general venue statute, which governs venue of all claims brought in federal court except where venue is "otherwise provided by law." *See* §§ 1391(a) & (b). Special venue provisions are typically intended to control venue of all claims brought under the statutes to

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which they relate. The Clean Water Act contains a special venue provision. Section 1365(c) of the Clean Water Act states, "any action representing a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located." (West Code Ann., 2004).

On the face of the Complaint, it is clear that Defendants operate a dairy within the boundaries of the Western District of Texas. Thus, venue is proper over the Plaintiff's CWA claim against Defendants. Defendants argue that since venue is not proper over the CWA claims against the Erath County Defendants, the Court should transfer the entire case to the Northern District of Texas in order "to keep this case consolidated, which is in the interest of justice." The Court has already solved this problem, albiet not in the way Defendants have suggested, by asserting pendent venue over the CWA claims against the Erath County defendants and therefore retaining all of Plaintiff's claims in a single action.[1] Since the noble purpose of Defendants' motion to transfer has been achieved, the portion of the motion which asks that the case be transferred to the Northern District of Texas will be denied.

B. Veil Piercing

Defendants' next argument is that Plaintiff's CERCLA claims must be dismissed against the individual defendants for two reasons. First, Defendants argue that Plaintiffs have failed to include sufficient allegations in the complaint which would allow the individual defendants to be held liable under CERCLA. The Court finds that Plaintiff has pled facts which would be sufficient to establish their claims against the individual defendants under both CERCLA. In order to hold a defendant liable under CERCLA, a plaintiff must establish that the defendant is a "covered person" under CERCLA and therefore amenable to a contribution claim. See CERCLA § 107(a), 42 U.S.C. § 9607(a). The statute defines a "covered person" as, among others:

---

[1] For a detailed discussion of the Court's decision to invoke pendent venue over the CWA claims against the Erath County defendants, see e.g. Memorandum Opinion and Order Re: Judy Lueck's Rule 12(b) Motion to Dismiss or, in the Alternative, Motion to Transfer Venue.

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of...

Geraghty and Miller, Inc. v. Conoco Inc. 234 F.3d 917, 927-28 (5th Cir. 2000)(citing 42 U.S.C. § 9607(a). Plaintiff has alleged that the individual defendants are owners and operators of the facilities which are alleged to have released the hazardous substances which form the basis of the CERCLA claim. Of course, case law has interpreted the "owner/operator" provisions of CERCLA to impose a burden of proof on the plaintiff before an individual may be held liable. In *Geraghty and Miller, Inc. v. Conoco Inc.*, the Fifth Circuit described the standard which courts have used to determine whether individuals may be liable under the "owner/operator" provisions of CERCLA:

> an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility.... [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. For one to be considered an operator, then, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility. This nexus has been described as a "well-settled rule" that " 'operator' liability ... only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir.1992); *see also CPC Int'l, Inc.*

> *v. Aerojet-General Corp.*, 731 F.Supp. 783, 788 (W.D.Mich.1989) ("The most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution.").
>
> A court must decide whether a contractor is an operator after considering the totality of the circumstances concerning its involvement at the site.

Geraghty and Miller, Inc. v. Conoco Inc. 234 F.3d 917, 928 (5th Cir. 2000)(some internal citations omitted). However, CERCLA does not contain any heightened pleading requirements, and therefore the "owner/operator" standard as set forth in *Geraghty* will be applied at the summary judgment stage, after an appropriate amount of time has passed to allow for an adequate amount of discovery. If, at the summary judgment stage, Defendant raises the issue and Plaintiff is unable to show that an individual defendant qualifies as a "covered person" under CERCLA, the Court will enter an appropriate order. Plaintiff's CERCLA claims against the individual defendants have been sufficiently pled, and Defendant's first argument is denied.

Second, Defendants claim that Plaintiffs have failed to make any allegations which would allow for piercing of the corporate veil, which Defendants argue is necessary in order to hold the individuals liable under CERCLA. This assertion is without merit, as veil-piercing is not required in order for individuals to be directly liable under the "owner/operator provisions of CERCLA. *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998)(*citing Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991)("CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act"); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990)("[A] person who is an operator of a facility is not protected from liability by the legal structure of ownership")).

C. Plaintiff's CERCLA and TSWDA Claims

Defendants argue that Plaintiff's CERCLA and TSWDA claims must be dismissed for several reasons. Each of Defendants' arguments will be addressed in turn.

1. Phosphorus as a Hazardous Substance

First, Defendants assert that Plaintiff's CERCLA claim is defective because cow manure and other phosphorus-containing materials are not listed as hazardous substances under CERCLA. Phosphorus is listed as a hazardous substance under CERCLA. In enacting CERCLA, Congress expansively defined the term "hazardous substance" to include :

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act ..., (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act ..., and (F) any imminently hazardous chemical substance or mixture with respect to which the [EPA] Administrator has taken action pursuant to section 2606 of Title 15.

42 U.S.C. § 9601(14). Pursuant to subsection (B), the EPA has listed more than 700 hazardous substances in Table 302.4 of 40 C.F.R. § 302.4 (1995). As the Second Circuit has stated, "[w]hen a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability. Liability under CERCLA depends only on the presence in any form of listed hazardous substances." *B.F.Goodrich Co. v. Murtha*, 958 F.2d 1192, 1201 (2d Cir. 1992). Phosphorus is listed as a hazardous substance under CERCLA. See 40 C.F.R. 302.4. Defendants attempt to distinguish phosphorus as listed under CERCLA from the type of phosphorus which is contained in cow manure and other materials

which are generated from dairy operations. Defendants argue that when the EPA listed phosphorus as a hazardous substance under CERCLA, the agency only included "elemental phosphorus", which is derived from phosphate rock. In support of its argument, Defendants cite two administrative documents, 50 Fed. Reg. 5190 (Feb. 6, 1985), and 66 Fed. Reg. 52670 (Oct. 17, 2001). While both of these documents mention the phrase "elemental phosphorus", neither stand for or even support the proposition that the EPA intended that only "elemental phosphorus" be classified as a hazardous substance under CERCLA. The Defendants' arguments regarding phosphorus are not supported by CERCLA, relevant case law or administrative regulations. As such, the Court finds that the type of phosphorus which Defendants are accused of releasing is a hazardous substance as defined under CERCLA, and Defendants' argument is denied.

2. The Fertilizer Application Exemption

Defendants next argue that Plaintiff's CERCLA and TSWDA claims must be dismissed because fertilizer application is not a release under the statute. Under CERCLA, one of the elements that a plaintiff must allege and prove is that the defendant facility released or threatened to release a hazardous substance. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347-48 (6th Cir.1998). CERCLA defines release as: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." 42 U.S.C. § 9601(22). Defendants correctly point out that the definition of release excludes "the normal application of fertilizer products." 42 U.S.C. § 9601(22). The TSWDA contains a similar exemption.

According to Defendants, since Plaintiff failed to allege that phosphorus has been released from anything other than the normal application of fertilizer, the CERCLA claim must therefore be dismissed. However, Plaintiff alleged that Defendants have done more than simply engage in the normal application of fertilizer. Plaintiff alleged that Defendants have improperly stored large amounts of waste on their property, and that they have failed to properly maintain these waste storage areas. Plaintiff alleged that these acts and omissions, among others, have caused and continue to cause large amounts of phosphorus and other pollutants to be released into the North Bosque Watershed and Lake Waco. The Court finds that Plaintiff has sufficiently alleged that a release as defined under CERCLA and TSWDA has occurred, and that Defendants' actions constitute more than the exempted "normal application of fertilizer." As such, Defendants argument is without merit.

3. Sufficiency of Plaintiff's "Arranger" Allegations

Defendants next argue that Plaintiff's CERCLA and TSWDA claims must be dismissed because Plaintiff cannot prove that Defendants have "arranged" for the disposal of waste in Lake Waco. Unfortunately for Defendants, Plaintiff does not have to prove that Defendants were "arrangers" at this stage of the litigation. The Court finds that Plaintiff sufficiently alleged that Defendants have arranged for disposal of hazardous substances at Lake Waco, as required under CERCLA and TSWDA. Thus, the Defendants' argument is denied.

4. Plaintiff's Response Costs and Remedial Action

Defendants argue that Plaintiff's CERCLA and TSWDA claims are defective because the steps which Plaintiff alleges it has taken to remedy the alleged releases of hazardous substances do not qualify as "response costs" or "remedial action" under either statute. As the Fifth Circuit has stated:

> CERCLA § 101 defines the terms "response," "removal," and

> "remedial action." Responses consist of removals and remedial actions and "enforcement activities related thereto." A "removal" is generally understood to be a short-term response and a "remedial action" is generally considered a long-term response or permanent solution.
>
> Removal is defined broadly, as follows:
>
> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of a threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.
>
> "Remedial action" is also defined broadly and includes:
>
> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release of threatened release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement...onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

U.S. v. Lowe, 118 F.3d 399, 402 (5th Cir. 1997)(citing CERCLA § 101(24), 42 U.S.C. § 9601(24)(internal citations omitted)). In Plaintiff's Second Amended Complaint, Plaintiff alleged that because of the algae bloom which is due to the alleged voluminous releases of phosphorus into the North Bosque Watershed, it has had to add chemicals into its water treatment systems to combat taste and odor problems. This allegation is sufficient to state a claim under CERCLA and TSWDA, and Defendants' argument is denied.

D. Failure to State a Claim under the Texas Solid Waste Disposal Act

Defendants argue that Plaintiff failed to state a claim under the Texas Solid Waste Disposal Act. Specifically, Defendants argue that Plaintiff failed to allege (1) that the Texas

Council for Environmental Quality ("TCEQ") approved of the Plaintiff's "remedial action", or (2) that Plaintiff took measures to notify Defendants prior to seeking cost recovery or contribution. After Defendants submitted this motion, Plaintiff's amended their complaint and corrected these deficiencies. In the Second Amended Complaint, Plaintiff states "The City of Waco has conducted a removal or remedial action within the meaning of 361.344 of TSWDA. Such removal or remedial action is necessary to address the release or threatened release of solid waste and has been approved by the TCEQ." This allegation is sufficient to show at this stage that TCEQ approved of the Plaintiff's "remedial action" as required under the TSWDA.

Plaintiff's Second Amended Complaint also states "[t]he City of Waco has made reasonable attempts to notify all Defendants of the existence of the release or threatened release of solid waste and that the City of Waco intended to take steps to eliminate the release or threatened release." Plaintiff goes on to allege that Defendants had actual notice of the release or threatened releases, as well as Plaintiff's intention to remedy the damage caused by such releases or threatened releases. These allegations are sufficient to defeat Defendants' second argument for dismissal of the TSWDA claims. As such, Defendants arguments as to why Plaintiff's TSWDA claim should be dismissed are without merit and must be denied.

E. Plaintiff's Tort Claims

Defendants argue that Plaintiff's claims for negligence, negligence *per se* and trespass should be dismissed because the State of Texas, rather than Plaintiff, owns Lake Waco. Thus, Defendants argue that only the State of Texas can assert tort claims for damages caused to Lake Waco. In support of their argument, Defendants cite Section 11021 of the Texas Water Code, which provides:

> (a) The water of the ordinary flow, underflow, and tides of every

> flowing river, natural stream, and lake, and of every ban or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

TEX. WATER CODE, § 11.021. Plaintiff correctly points out that ownership is not an element of negligence or negligence *per se* in Texas. In order to sustain an action for negligence in Texas, a plaintiff must establish three elements. There must be a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987).

Plaintiff has alleged that the defendant dairies owed a duty not to pollute Lake Waco or the water contained therein, that the defendants acts and omissions breached such a duty, and that Plaintiff suffered harm as a result of the defendants' breaches, as the quality of Plaintiff's drinking water diminished and the costs of treating the water supply increased considerably. Furthermore, Plaintiff alleges that it has property rights to the water that is contained in Lake Waco. These allegations are sufficient to sustain a claim for negligence. Similarly, Plaintiff's allegations are sufficient to support its negligence *per se* claim. Finally, Plaintiff's trespass claim is sustained because Plaintiff has alleged that the defendants' polluted discharges have entered Plaintiff's water treatment facilities and that such intrusions were not authorized. This is sufficient to sustain a trespass claim, and Defendants' argument lacks merit. Accordingly, it is

ORDERED that Defendants' Rule 12(b) Motion to Dismiss, or, in the Alternative, to Transfer Venue is **DENIED**.

Signed this 29 day of March, 2005.

WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE

FILED

OCT 24 2005

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

THE CITY OF WACO,
Plaintiff,

v.

DENNIS SCHOUTEN, ET AL.
Defendants.

CIVIL ACTION NO. W-04-CA-118

ORDER

Before the Court is Defendant AzTex Dairy, Inc.'s Motion for Reconsideration and Clarification. In its Motion, Aztex asks the Court to clarify its ruling on the issue of phosphorous as a hazardous substance under CERCLA. Aztex asserts that the language in the Court's Order could be construed as a finding that phosphorous in cow manure is a hazardous substance under CERCLA as a matter of law. The Court's ruling was only that for the purposes of the Motion to Dismiss under Rule 12(b), Plaintiff's CERCLA claim survived because Plaintiff alleged in its pleadings that phosphorous was a hazardous substance under the statute. Accordingly, it is

ORDERED that Defendant's Motion for Clarification is **GRANTED**. It is further

ORDERED that Defendant's Motion for Reconsideration is **DENIED** as moot, as the issue as to whether phosphorous is a hazardous substance under CERCLA as a matter of law will be taken up by the Court after appropriate briefing at the summary judgment stage.

Signed this 24 day of October, 2005.

Walter S. Smith

WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE

393

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THE CITY OF WACO **Plaintiff**	§ § §	
v.	§	**CIVIL CAUSE NO. W-04-CA-118**
DENNIS SCHOUTEN, ET AL. **Defendants**	§ § § §	

THIRD AMENDED COMPLAINT

NOW COMES the City of Waco, Plaintiff, herein and alleges the following:

JURISDICTION

1. Plaintiff City of Waco brings this suit seeking remedies for pollution and damage caused by Defendants to Plaintiff's property and Plaintiff's water rights, including Plaintiff's right to store water in Lake Waco, and Plaintiff's water treatment and related facilities. Plaintiff is asserting causes of action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the federal Clean Water Act, the Texas Solid Waste Disposal Act, and state common law causes of action for negligence, negligence per se and trespass. This Court has jurisdiction over the subject matter of this lawsuit pursuant to 28 U.S.C. §§ 1331 & 1332, 42 U.S.C. §§ 9607 & 9613(b) (CERCLA), and 33 U.S.C. § 1365(a) (the Clean Water Act). The amount in controversy exceeds the sum of $75,000.00.

VENUE

2. Plaintiff's water supply system, a municipal water supply system under Texas law, which includes Lake Waco, is located within this District and is the drinking water supply for approximately one hundred and fifty thousand (150,000) citizens who live in the City of Waco and surrounding communities, all within this District. Plaintiff is located within this

District. Defendants have engaged in acts and omissions which have caused substantial damage to Plaintiff's water supply. This is an action for damages and injunctive relief to remedy the Defendants' wrongful pollution, which has harmed Plaintiff's water rights, Plaintiff's water treatment facilities and Plaintiff's water supply. Therefore, venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and 42 U.S.C. § 9613(b).

3. Under the local action doctrine, venue in the Western District is proper because this case necessarily involves a determination of the title to the water rights owned by the City of Waco. Defendants' actions, as set forth herein, constitute a cloud on the title to Plaintiff's property rights. Venue is also proper based on the local action doctrine because the case involves damage to Plaintiff's water rights including water stored in Lake Waco and to the Plaintiff's water handling and treatment equipment. The City has the right to take water from Lake Waco and the right to store water in Lake Waco. Thus, the City of Waco has water rights relating to the water in Lake Waco and also effectively owns water within Lake Waco. The location of the City's water, the City's water rights and the City's water handling and treatment equipment is in the Western District.

4. Furthermore, venue in the Western District is proper because the entire suit is one cause of action for damage to water rights and water and equipment owned by the City. There are various claims for relief but only one cause of action, and venue is proper for that action.

THE PARTIES

5. The City of Waco ("the City") is an incorporated Texas home-rule municipality and a political subdivision of the State of Texas. The City of Waco has approximately 110,000 residents. The sole source of public drinking water for those 110,000 persons is Lake Waco. The City's principal place of business is in Waco, McLennan County, Texas.

6. Defendant Schouten Dairy with Permit No. 04133 is located at Route 4, Box 113, Stephenville, Texas 76401.

7. Defendant Dennis Schouten, Individually and d/b/a Schouten Dairy, is an owner and/or operator of Defendant Schouten Dairy and/or is an owner of land on which Schouten Dairy is located and has entered an appearance in this cause.

8. Defendants Cornelius T. Schouten, Jr., Joan Schouten, Nicholas Schouten, Linda Schouten, and Nancy Schouten, Individually and d/b/a Schouten Dairy, are owners and/or operators of Defendant Schouten Dairy and/or are owners of land on which Schouten Dairy is located and have entered an appearance in this cause.

9. Defendant J & L Dairy (a.k.a. J & L Pack Dairy) d/b/a Jimmy Don and Larry Pack with Permit No. 03563 is located at 863 CR 415, Stephenville, Texas 76401-8747.

10. Defendants Jimmy Don Pack, Larry Pack, Alma Marilyn Pack and Meine Huisman (a.k.a. Huisman Dairy) are owners of J & L Dairy and/or are owners of land on which Defendant J & L Dairy is located and have entered an appearance in this cause. Defendants Jimmy Don Pack and Meine Huisman (a.k.a. Huisman Dairy) are also operators of J & L Dairy.

11. Defendant Cen-Tex Dairy L.L.C., a.k.a. Hammonds Dairy with Permit No. 03132 is located at Route 1, Box 474, Hico, Texas 76457.

12. Defendant Lonnie Hammonds is the owner/operator of Defendant Centex Dairy and/or is the owner of land on which Centex Dairy is located and has entered an appearance in this cause.

13. Defendant Dutch Cowboy Dairy with Permit No. 03316 is located at Route 5, Box 166, Dublin, Texas 76446.

14. Defendants Steve Byl, Paul Byl and Yvonne Byl are owners and/or operators of

Defendant Dutch Cowboy Dairy and/or are owners of land on which Dutch Cowboy Dairy is located, and have entered an appearance in this cause.

15. Defendant Excel Dairy, L.L.C. with Permit No. 03077 is located at 9715 FM 2156, Dublin, Texas 76446, and has entered an appearance in this cause.

16. Defendant Mear Family Trust, Thomas H. Mear, Tom Mear and Eleanore Mear, Individually and as Authorized Representatives or Trustees of the Mear Family Trust, are owners of Excel Dairy and/or are owners of land on which Excel Dairy is located and have entered an appearance in this cause.

17. Defendant Alan Vanderhorst is an owner and operator of Excel Dairy and has entered an appearance in this cause.

18. Defendant Triple Dutch Dairy (a.k.a. Triple Dutch #2), a General Partnership, with Permit No. 02922 is located at 19184 North FM 219, Dublin, Texas 766446.

19. Defendants Mr. Paul Van Leeuwan and Mr. Andy Van Die are owners of Triple Dutch Dairy (a.k.a. Triple Dutch #2) and/or are owners of land on which Triple Dutch Dairy is located and have entered an appearance in this cause.

20. Defendant Hidden View Dairy, a partnership, with Permit No. 03197 is located at 1684 PR 1401, Dublin, Texas 76446.

21. Defendant William C. DeJong and William N. DeJong are owners and/or operators of Hidden View Dairy and/or are owners of land on which Hidden View Dairy is located and have entered an appearance in this cause.

22. Defendant Aztex Dairy, Inc. with expired Registration No. WQ0002953-000 is located at 1137 County Road 347, Dublin, Texas 76446-5474 and has entered an appearance in this cause.

23. Defendants Fred R. Lueck, Sr. (a.k.a. Fred Lueck a.k.a. Fred Ray Lueck) and Judy A. Lueck are owners and/or operators of Aztex Dairy and /or are owners of land on which Aztex Dairy is located and have entered an appearance in this cause.

24. Defendant Bill Schouten Dairy, a.k.a. Tex Ag Dairy a.k.a. Tex-S Dairy a.k.a. S Cow 10 (hereinafter "Bill Schouten Dairy") with Registration No. WQ003640 is located at Route 2, Box 112-A, Hico, Texas 76457 or 12070 N. Hwy 281, Hico, Texas 76457.

25. Defendant Tex-S, L.L.C. is an owner of Bill Schouten Dairy and/or is an owner of land on which Bill Schouten Dairy is located, and Defendant Bill Schouten is an owner and/or operator of Bill Schouten Dairy and/or is an owner of the land on which Bill Schouten Dairy is located and have entered an appearance in this cause.

26. Defendants Pete Schouten and M.D. Schouten are owners and/or operators of Bill Schouten Dairy and/or are owners of land on which Bill Schouten Dairy is located and have entered an appearance in this cause.

27. Defendant Golden Star Dairy a.k.a. Schouten Golden Star Dairy a.k.a Schouten Dairy (hereinafter "Golden Star Dairy") with Permit No. 03656, and which is located at Route 2, Box 229, Hico, Texas 76457.

28. Defendant Robert J. Schouten is an owner and/or operator of Golden Star Dairy and/or is an owner of the land on which Golden Star Dairy is located and has entered an appearance in this cause.

29. Defendant Pete Henry Schouten is an owner and/or operator of Golden Star Dairy and/or is an owner of land on which Golden Star Dairy is located and has entered an appearance in this cause.

30. Defendant Pieter Bakker a.k.a. Pieter Barker is an operator of Golden Star Dairy

and has entered an appearance in this cause.

31. Scenic Ridge Dairy a.k.a. Senic Ridge Dairy a.k.a Pigeon Road Dairy a.k.a Beltman Dairy a.k.a Tony Beltman Dairy a.k.a. Dewit #2 Dairy (hereinafter "Scenic Ridge Dairy") with Registration No. 03162 located at 588 Private Road 928, Stephenville, Texas 76401-8787 and with a mailing address of P.O. Box 181, Lingleville, Texas 76461.

32. Scenic Ridge Dairy, Inc. is an owner of Scenic Ridge Dairy and/or an owner of land on which Scenic Ridge Dairy is located and has been served with process through its Registered Agent, Tony Beltman at Route 4, Box 254, Stephenville, Texas 76401.

33. Defendant Tony Beltman is an owner and/or operator of Scenic Ridge Dairy and/or is an owner of the land on which Scenic Ridge Dairy is located and has been served with process at Route 4, Box 254, Stephenville, Texas 76401.

34. Defendant Russell Carpenter Dairy with Registration No. WQ0003185-000 Route 4, Box 206, Stephenville, Texas 76401.

35. Defendant Russell Carpenter is an owner and/or operator of Russell Carpenter Dairy and/or is an owner of the land on which Russell Carpenter Diary is located and has entered an appearance in this cause.

36. Defendant Parks Hill Dairy a.k.a. Double "S" Dairy a.k.a. Smulder #1 Dairy (hereinafter "Parks Hill Dairy") with Registration No. 03315, has the address P.O. Box 152, Lingleville, Texas 76461.

37. Defendant Harold Wayne Parks d.b.a. Double "S" Dairy is an owner and/or operator of Parks Hill Dairy and/or is an owner of the land on which Parks Hill Diary is located and has entered an appearance in this cause.

FACTUAL ALLEGATIONS

A. History and Characteristics of Lake Waco

38. Lake Waco is located in the southeastern portion of the Bosque River Watershed, Brazos River Basin, entirely within McLennan County, Texas. Lake Waco is a lake on the northwestern edge of the Waco city limits.

39. In or about 1928, construction of a dam to impound Lake Waco began and was completed in or about 1930. The project was owned and operated by the City of Waco.

40. Lake Waco is fed by the North Bosque, the Middle Bosque, and the South Bosque rivers, and by Hog Creek.

41. The contributing watershed to Lake Waco is approximately 1,652 square miles with about 1,260 square miles in the North Bosque River watershed.

42. The North Bosque River and its tributaries flow downstream and terminate in Lake Waco.

43. Pollutants dissolved and entrained in the waters of the North Bosque are carried into Lake Waco.

44. In or about 1958, the City of Waco, with the assistance and support of the U.S. Army Corp of Engineers, began construction of a second larger dam on Lake Waco to provide additional flood control and drinking water.

45. That project was completed, and the dam, as it presently exists, was completed in or about 1965.

46. Lake Waco has a surface area of approximately 8900 surface acres and has approximately 72 miles of shoreline. It has a maximum depth of approximately 85 feet and has a storage capacity of approximately 50 billion gallons at conservation level.

47. All adjudicated and permitted rights to the water impounded in Lake Waco are owned by the City. These water rights are permanent.

48. As a result of its rights to store water in and to divert and use water from Lake Waco, the City of Waco has a real property interest in Lake Waco and the water contained in Lake Waco.

B. Uses of and Importance of Lake Waco

49. Lake Waco represents the sole source of public drinking water for the City of Waco and a significant source of drinking water for many surrounding communities.

50. Lake Waco is the primary source of drinking water and domestic use for approximately 150,000 citizens who reside in Waco and smaller municipalities in the area.

51. Lake Waco is used for a wide variety of recreational activities, including fishing, boating, swimming, and water skiing. In addition to the activities available on its waters, Lake Waco shores provide recreational activities and amenities in the form of parks, picnic areas, boat docks and camping facilities. Lake Waco is also put to a variety of other municipal purposes, including irrigation and conservation.

52. A clean and reliable source of drinking water is indispensable to the health and welfare of the citizens of Waco and is also essential to the existence and growth of business and industry in Waco. A substantial supply of clean water is also critical to the City's ability to maintain and attract industrial enterprises.

53. Lake Waco is the regional water supply. There is no viable alternative to it as the regional water supply, and that will continue to be the case into the foreseeable future.

C. Cows of Defendant Dairies in Plaintiff's Watershed

54. Each of the Defendants is an owner or operator of an Animal Feeding Operation

(AFO) or a Concentrated Animal Feeding Operation (CAFO) which is located in the North Bosque River Watershed, which feeds into Lake Waco.

55. The dairy industry as it exists in the North Bosque River Watershed in Erath, Hamilton, and Comanche counties, generates approximately $303 million-a-year.

56. Defendant Schouten Dairy is permitted for operations with 650 dairy cattle.

57. Defendant J & L Dairy is permitted for operations with 450 dairy cattle.

58. Defendant Cen-Tex Dairy is permitted for operations with 1900 dairy cattle.

59. Defendant Dutch Cowboy Dairy is permitted for operations with 700 milking cows.

60. Defendant Excel Dairy is permitted for operations with 3,000 dairy cattle.

61. Defendant Triple Dutch Dairy is permitted for operations with 900 dairy cattle.

62. Defendant Hidden View Dairy is permitted for operations with 2,000 dairy cattle, and seeking to expand to operations with 3,000 head.

63. Defendant Aztex Dairy is permitted for operations with 1,300 dairy cattle.

64. Defendant Bill Schouten Dairy is permitted for operations with 999 dairy cattle.

65. Defendant Golden Star Dairy is permitted for operations with 400 dairy cattle.

66. Defendant Scenic Ridge Dairy is permitted for operations with 990 dairy cattle.

67. Defendant Russell Carpenter Dairy is permitted for operations with 750 dairy cattle.

68. Defendant Parks Hills Dairy is permitted for operations with 500 dairy cattle.

69. In total, Defendant dairies conduct operations which are permitted for approximately 14,500 cows in the North Bosque Watershed. Defendants, because of their poor management practices and consistent failure to comply with applicable rules and regulations, are

substantial contributors to the pollution problems with Lake Waco water.

D. Dairies Produce Huge Amounts of Waste

70. A dairy cow generates up to 115 pounds of manure per day or more, versus a beef cow which produces approximately 75 pounds of manure per day.

71. Defendant dairies' permitted cows would account for in excess of 1,600,000 pounds of manure per day. In addition to the solid waste generated by the dairy cows, the cows produce large amounts of liquid waste.

72. In addition to the milking cows and the waste they produce, some Defendant dairies maintain additional cows on their dairy which are not milked on a daily basis. Those "dry cows", as they are called, can add another 7 to 15 percent to the overall size of the cow population on the dairy.

73. Best management practices indicate that to properly dispose of waste, a dairy operator should maintain 1.5 to 3 acres of land per dairy cow. The concentration of Defendants' cows is far greater than that. In many instances, Defendants maintain less than 1/4 to 1/5 an acre per cow.

74. The solid and liquid cow waste contains many pathogens and bacteria.

75. The huge amounts of solid and liquid waste generated by the dairy cows contain very high concentrations of phosphorus.

76. A single dairy cow may produce as much as 40 pounds of phosphorus in manure per year or more.

77. The phosphorus being released by Defendants is a pollutant and is poisonous. Both CERCLA and the Clean Water Act recognize phosphorus as a hazardous substance.

78. Because of the enormous amounts of waste generated on a daily basis by dairies,

it is critical that the dairy operators dispose of such waste properly and in a way which ensures that the waste does not reach the water supply. Plaintiff sues Defendants in this cause because Defendants have failed to properly manage and dispose of the waste from their large commercial dairy operations and because they continue to fail to do so and because that failure has resulted in pollution of Lake Waco and substantial damage and injury to Plaintiff.

E. Defendants Have Failed To Properly Handle Liquid and Solid Waste Which Has Resulted in Pollution of Lake Waco

i. Lagoons

79. Liquid waste from cows and slurry resulting from washwater being combined with solid waste from cows is collected in "lagoons" located on the dairies. Because the lagoons are comprised of liquid waste, as well as some substantial percentage of solid waste, the contents of those lagoons is very high in phosphorus and other hazardous substances. Those lagoons are supposed to be specially and properly lined to ensure that the liquid waste is contained and does not leach into the ground and into the groundwaters and water supplies. Defendants have failed to construct and maintain their lagoons in a way which prevents leaching.

80. Dairy operators are supposed to control the levels of the lagoons to ensure that they do not overflow during rain and other events. Those overflows, which are referred to as unauthorized discharges, are to be prevented because, when they do occur, the waste runs, in an uncontrolled manner, onto and over the land, off of the dairies and into the groundwaters and surface water supplies. Defendants have failed to control the levels of their lagoons and have improperly maintained their lagoons. These failures and omissions have resulted in wastewater running out of the lagoons and into the watershed. This runoff occurs not only in significant rains, but also at times when there is no or relatively small rainfall events. Such occurrences are in violation of Defendants' permits and in violation of state and federal law.

81. On those occasions when Defendants have reduced the volume of materials in their lagoons by spreading it on their fields, they have frequently done so in a manner which results in contents of the lagoons entering the creeks, the watershed and the Lake Waco water supply.

ii. Improper Maintenance of Waste Application Fields and Waste Storage Areas

82. Defendants generate and have to dispose of enormous amounts of phosphorus-containing manure. With their permitted cows, Defendants would generate in excess of 800 tons of solid cow waste per day, which has to be disposed of on-site or is stored in piles while waiting to be transported off-site.

83. Defendants routinely store large amounts of solid waste on their property in waste storage areas. The waste in the waste storage areas will be disposed on-site or transported off-site. The phosphorus in such manure waste is present at levels which are far greater than those present in normal agricultural operations. Several times a year, there are heavy rains which turn portions of this stored waste into liquid manure that runs off of Defendants' property and into the watershed which supplies Lake Waco.

84. As a result of Defendants' conduct, large amounts of manure-laden waste make its way into the North Bosque River. This has dramatic detrimental effects on Lake Waco.

85. Defendants also dispose of some of the waste they generate by spreading it on fields on their facilities. Because the land they possess is so relatively small, the Defendants long ago exceeded the natural capacity of much of the soils and vegetation on their facilities to absorb the phosphorus or for the soil to otherwise assimilate the phosphorus.

86. Fields containing phosphorus at levels in the range of 60 to 80 parts per million (ppm) greatly exceed the amount of phosphorus needed for optimal growth for any type of plant.

At levels of 200 ppm and higher, not only is there far more phosphorus than can be used by plants, but there is also a very high risk that the phosphorus will run off of the fields and into the water supply at concentrations detrimental to the water supply. Once soil phosphorus reaches levels in excess of 200 ppm, the time required for the phosphorus levels to decline is considerable; that process can take years or even decades. Thus, the risk of runoff from fields with phosphorus levels in excess of 200 ppm is considerable and extended.

87. Defendants have greatly overapplied waste to their fields and have thereby caused those fields to reach soil phosphorus levels that greatly exceed 200 ppm. At the same time, Defendants have failed to properly maintain their fields, and therefore the risk of runoff is even greater.

88. In 2003, soil tests for fields on Defendant Schouten Dairy were as high as 460 ppm.

89. In 2003, soil tests for fields on Defendant J & L Dairy were as high as 280 ppm.

90. In 2003, soil tests for fields on Defendant Cen-Tex Dairy were as high as 400 ppm.

91. In 2001, soil tests for Defendant Dutch Cowboy Dairy were as high as 475 ppm.

92. In 2003, soils tests for fields on Defendant Excel Dairy were as high as 386 ppm.

93. In 2004, soil tests for fields on Defendant Triple Dutch Dairy were as high as 559 ppm.

94. In 2003, soil tests for fields on Defendant Hidden View Dairy were as high as 442 ppm.

95. In 2003, soil tests for fields on Defendant Aztex Dairy were as high as 352 ppm.

96. In 2001, soil tests for Bill Schouten Dairy were as high as 350 ppm.

97. In 2003, soil tests for Golden Star Dairy were as high as 540 ppm.

98. In 2003, soil tests for Scenic Ridge Dairy were as high as 578 ppm.

99. In 2003, soil tests for Russell Carpenter Dairy were as high as 400 ppm.

100. In 2003, soil tests for Parks Hill Dairy were as high as 300 ppm.

101. Because Defendants maintain fields with such high phosphorus levels, anytime there are heavy rains, phosphorus runs off of the fields and into the watershed.

102. Each of these occurrences constitutes an unauthorized discharge and causes pollutants to run into the watershed and ultimately into Lake Waco.

103. Defendant dairies have permits issued to them by the State of Texas which require them to conduct their operations in accordance with various laws, rules and regulations. Defendants have operated their dairies and maintained their land in such a way as to have consistently and egregiously violated the applicable laws and regulations, and they continue to do so. Specific conduct by Defendants which violates applicable law and which has caused and continues to cause pollution is set out in Exhibits A through M attached to Plaintiff's Second Amended Complaint and incorporated herein.

104. Discharges by Defendants into the North Bosque Watershed have caused the quality of the water in Lake Waco to deteriorate.

105. The manure-laden waste entering the watershed from the Defendant dairies pollutes and fouls Lake Waco. Among the problems such pollution creates, is that the phosphorous contained in such waste causes the growth of algae, which generates substantial taste and odor problems with the water in Lake Waco.

F. Taste and Odor Problems

106. Prior to the late 1980's the City of Waco experienced taste and odor problems

with the water from Lake Waco only on a sporadic and episodic basis. Those sporadic and episodic taste and odor problems in the water resolved without effective special water treatment.

107. In or about the late 1980's, large industrial dairy operators like Defendants began moving into Erath County and into the North Bosque watershed.

108. In or about 1988 there were very notable increases in the levels of algae in Lake Waco. The mass and volume of algae increased to levels which had never before occurred in Lake Waco. There was and is a direct correlation between the increased levels of phosphorus in Lake Waco resulting from dairy waste runoff, increased levels of algae in the Lake and the taste and odor problems with the water in Lake Waco. As the algae level in the lake increased, so did the taste and odor problems with the water.

109. The problems became so bad and so greatly affected the quality of the water that the City began using a different and additional treatment process in order to make the water acceptable for human consumption.

110. From in or about 1988 to December of 1996, the frequency and severity of the taste and odor problems with the water in Lake Waco continued to increase dramatically. There was a corresponding increase in the efforts and expense required of the City to reduce such taste and odor problems to an acceptable level. During that timeframe, those efforts increased in both frequency and degree.

111. In or about December of 1996, the City of Waco experienced a tremendous algae bloom and a severe episode of taste and odor problems in the water in Lake Waco. Since that time the City of Waco has had to continually employ treatment methods it would not otherwise use. Those treatment methods involve adding a substance to the water whose sole purpose is to reduce the substantial taste and odor problems of the water from Lake Waco. Unfortunately, the

City's increasing efforts are also becoming increasingly less effective.

112. The City treats the taste and odor problems by putting additives into the water. The City is putting those additives into the water continually and in very high levels. Despite the high levels at which the additives are being put into the water, those additives are becoming much less effective at improving the taste and odor problems, and, over time, such problems with the City's water source have continued to increase. Additionally, the City is reaching the upper limit of the level at which those additives can be put into the water, because, at very high levels, those additives cause adverse side effects by producing undesirable chemical byproducts and by adversely affecting other aspects of the treatment process.

113. The water quality of Lake Waco is substantially impaired. The City of Waco's water rights have been substantially damaged.

G. Damages and Costs to City of Treating Taste and Odor Problems Caused by Defendants

114. The taste and odor problems with the water in Lake Waco are the result of algae, which is generated by phosphorus coming into Lake Waco from waste and pollutants produced by the dairies in the North Bosque Watershed, and the Defendant dairies are substantial contributors to and causes of those problems.

115. The City of Waco has suffered actual and special damages as a result of the acts and omissions of Defendants. Since in or about 1995, the City of Waco has spent close to $3.5 million to address taste and odor problems in Lake Waco. Those expenditures are in excess of those which would have otherwise been made for water treatment. Ongoing remedies for treatment of taste and odor problems which are caused by excessive phosphorus from dairies currently consume more than half (as much as 55 percent) of the City of Waco's chemical water treatment budget. Prior to 1996, that figure was about 10 percent.

116. Even though the City has been and continues to be very aggressive and diligent in its efforts to treat the taste and odor problems in Lake Waco's water in an efficient and effective manner, its current treatment methods are only able to remove approximately 70 percent of the substance which causes the offending tastes and odors. Although greatly reduced, the remaining 30 percent is still at a level which causes the water from Lake Waco to be quite offensive in taste and smell to the average person. The taste and odor problems have affected and will continue to affect the value of the City of Waco's water rights and of water owned by the City of Waco. Further, because the City is currently unable to sufficiently reduce such taste and odor problems and because of concerns about this problem increasing in the future, the City has found it necessary to consider additional, advanced water treatment to include a new water treatment facility. Projected costs of the new water treatment facility exceed $50 million dollars. A new water treatment facility would do nothing to improve the quality of water in Lake Waco.

H. **Other Concerns**

117. Phosphorus and the resulting taste and odor problems are just one of the problems which have developed with the water in Lake Waco as a result of pollution from the dairies. Runoff and pollution from the dairies have resulted in pathogens and pollutants, in addition to phosphorus, entering and imperiling the water of the North Bosque River and Lake Waco. The pathogens, which are borne in the cow manure and which enter Lake Waco, have created concern about the health of the citizens and the safety of the water to the citizens who fish, swim, ski and engage in other water activities in Lake Waco. If this pollution is allowed to continue unabated, there is the potential for substantial risk to the health and welfare of the users and consumers of Lake Waco water.

I. Polluted/Impaired State of Lake Waco

118. Many scientific and peer-reviewed studies have established that there is pollution in the North Bosque watershed and that one of the pollutants is phosphorus from the dairies.

119. In or about 1998 the Texas Natural Resource Conservation Commission, now called the Texas Commission on Environmental Quality ("TCEQ"), designated those portions of the North Bosque River, which are in Lake Waco's watershed, as impaired. The designation of the River as impaired was due to the failure of the River to meet water quality standards and because of the known dangers associated with engaging in contact recreation in the River due to the presence in the water of bacteria and other pathogens. The Upper North Bosque River has been placed on the Environmental Protection Agency's impaired water list.

120. Each of the Defendants has caused and continues to cause pollution to Lake Waco through their wrongful discharge of waste and other pollutants into the North Bosque River watershed. Through their acts and omissions, each Defendant is causing ongoing and immediate damage to the environment, to the quality of the water in Lake Waco, and to City of Waco water rights.

121. The continued pollution caused by these Defendants will result in future costs and expenses to investigate and treat the problem until a final remedy is developed and implemented. If this problem is not quickly addressed and the polluting conduct not abated, the current water supply may be irreparably damaged.

FIRST CAUSE OF ACTION

Cost Recovery and Contribution Under CERCLA §§ 107 and 113

122. Plaintiff realleges and incorporates by reference all allegations set out in

Paragraphs 1 through 121.

123. Plaintiff and each Defendant is a "person" within the meaning of § 101(21) of CERCLA.

124. Each Defendant owned or operated a dairy, including associated areas used to apply waste. Those dairies and the areas used to apply waste are "facilities" within the meaning of § 101(9) of CERCLA.

125. By their inappropriate environmental conduct, each Defendant has arranged for disposal of hazardous substances at Lake Waco. Lake Waco therefore is a "facility" within the meaning of § 101(9) of CERCLA.

126. "Hazardous substances" within the meaning of CERCLA § 104(14), including in particular but not limited to phosphorus, which is a listed hazardous substance, were disposed of in the North Bosque River watershed, through the Defendants' industrial dairy operations and their acts and omissions, resulting in "releases" and/or "threatened releases" (within the meaning of CERCLA § 102(22)) of hazardous substances into Lake Waco.

127. As a result of such releases or threatened releases, Plaintiff has incurred and will continue to incur necessary response costs (as defined in 42 U.S.C. § 9601(25)) in a manner consistent with the National Contingency Plan (NCP), or alternatively, not inconsistent with the NCP.

128. By reason of the foregoing, Plaintiff is entitled under CERCLA § 107 to recover from the Defendants, jointly and severally, all of Plaintiff's past and present necessary response costs.

129. Plaintiff is also entitled to a declaratory judgment holding the Defendants jointly and severally liable for future necessary response costs incurred by Plaintiff.

130. Plaintiff has not contributed to the pollution of the facility and therefore is without liability. Plaintiff is not a party who is responsible or potentially responsible under CERCLA § 107 (42 U.S.C. § 9607). Additionally and alternatively, if Plaintiff is deemed to be a potentially responsible party under CERCLA § 107 (which Plaintiff denies), then Plaintiff is a party who qualifies for the defenses provided under CERCLA (42 USC 9607 (b)) including but not limited to 42 U.S.C. § 9607(b)(3) in that the releases or threats of releases of hazardous substances and the damages resulting therefrom were caused solely by an act of omission of a third party other than an employee or agent of Plaintiff or one with whom Plaintiff has a contractual relationship and that Plaintiff exercised due care with respect to the hazardous substance concerned, taking into account the characteristics of such hazardous substance in light of all relevant facts and circumstances and Plaintiff took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions

131. If Plaintiff is deemed to have made some contribution to the facility, Section 113(f) of CERCLA provides that "any person may seek contribution from any other person who is liable or potentially liable under CERCLA § 107(a)," and "the court may allocate response costs among responsible parties using such equitable factors as the court determines are appropriate." See 42 U.S.C. § 9613(f).

132. In the alternative to Plaintiff's CERCLA § 107 claims for direct costs, Plaintiff is entitled to judgment under CERCLA § 113 against the Defendants for contribution to Plaintiff's response costs, as well as declaratory judgment that the Defendants are liable to Plaintiff for contribution for Plaintiff's future response costs.

133. Plaintiff has complied with all conditions necessary for Plaintiff to recover all relief sought herein under CERCLA § 107 and/or 113 including by providing a copy of the

complaint to the Attorney General of the United States and to the Administrator of the EPA.

SECOND CAUSE OF ACTION

Clean Water Act

134. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

135. Based on and in connection with those acts, Plaintiff alleges a citizen suit claim against all Defendants under the federal Clean Water Act, 33 U.S.C. § 1365(a)(1).

136. Plaintiff gave notice of the Clean Water Act violations alleged in this Complaint in compliance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. Part 135. *See* Exhibits A through M (Notice of Intent to Sue letters dated February 12, 2004, and June 8, 2004) attached to Plaintiff's Second Amended Compliant and incorporated herein. Accordingly, all conditions precedent have been satisfied.

137. More than sixty (60) days have passed since the notice letters were served on the recipients.

138. The violations complained of in this Complaint are continuing and ongoing and/or were intermittent or sporadic and were likely to occur in the future. Such violations include but are not limited to improper application of waste, improper waste disposal, unauthorized discharges and failure to properly conduct and report soil analysis.

139. Neither the EPA nor the TCEQ has commenced or diligently prosecuted a civil or criminal action in a court of the United States, or a State, to require compliance with applicable statutes and regulations and to correct the violations alleged in this Complaint.

140. The EPA has not commenced or diligently prosecuted an action for administrative penalties for the violations alleged in this Complaint. The TCEQ has prosecuted formal

enforcement actions for administrative penalties against certain of the Defendant dairies and has issued notices of violations of permits to certain Defendant dairies. These administrative actions do not preclude Plaintiff from filing this citizen suit. *See Texans United v. Crown Central Petroleum Corp.*, 207 F.3d 789 (5th Cir. 2000).

141. Section 1311 of the Clean Water Act prohibits the discharge of pollutants except as in compliance with provisions of the Clean Water Act, 33 U.S.C. § 1311. Section 1342 of the Clean Water Act provides for permits that regulate the discharge of pollutants. 33 U.S.C. § 1342. The discharge of any pollutant without a permit is an unlawful act under Section 1311. *See Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996). The discharge of a pollutant in violation of a permit issued under a federal program delegated to a state is an unlawful act. *See Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976) and 33 U.S.C. § 1342(k).

142. The Clean Water Act defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

143. The Clean Water Act defines "pollutant" as "dredged spoil, solid waste,... sewage, garbage,... chemical wastes, biological materials,... heat,... rock, sand cellar dirt and industrial, municipal, and *agricultural waste* discharged into water." 33 U.S.C. § 1362(6) (emphasis added).

144. The Clean Water Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The definition of "navigable waters" has been construed by the courts to include streams, rivers, creeks, and other tributaries of larger waters. *See, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 915 (5th Cir. 1983).

145. The Clean Water Act defines "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation* ["CAFO"],... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). See also, the regulatory definition of CAFOs at 40 C.F.R. § 122.23(a) (2003) ("Concentrated animal feeding operations are point sources subject to the NPDES permit program.") This provision defines a CAFO as an animal feeding operation ("AFO") that is defined as a Large CAFO or as a Medium CAFO under section 122.23. 40 C.F.R. § 122.23(b)(2).

146. Even if Defendant dairies are not CAFOs, Defendants would still be liable for discharges because runoff from overapplied fields is a point source, and all persons, even if not CAFO's, can be liable for "point source" discharges.

147. The definition of "point source" includes "any discernible, confined, and discreet conveyance, including but not limited to, any pipe, ditch, channel, . . . conduit, . . . container, . . . from which pollutants are or may be discharged." (See the full text of the definition of "point source" in 40 C.F.R. § 122.2.) These terms in the definition consistently have been broadly construed in such cases as *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44-47 (5th Cir. 1980); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370-74 (10th Cir. 1979); and *Reynolds v. Rick's Mushroom Service*, 246 F. Supp. 2d 449, 456-58 (E.D. PA. 2003), in order to further congressional intent to regulate all identifiable sources of pollution and, therefore, to apply to the means by which Defendants channel wastewater from animal confinement areas to wastewater lagoons. Wastewater from the Defendants' dairy operations is then pumped from the lagoons through a pipe, to a "big gun" sprayer or other irrigation system, that sprays it onto waste application fields. From those fields (during the saturated soil conditions occurring during

rainstorms) the waste runs into tributaries of the North Bosque River. The definition of "discharge of a pollutant" begins with the express statement that "[T]his definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." Defendants' operations and conduct clearly come within these definitions.

148. These discharges of wastewater from the Defendant dairies' waste application fields, which result from chronic and catastrophic rainstorms and otherwise, are "point source" discharges.

149. Section 1362(14) excludes "agricultural stormwater discharges and return flows from irrigated agriculture" from this definition. However, Defendants' discharges do not qualify for these exemptions under the reasoning given in *Concerned Area Residents for the Environment v. Southview Farm,* 34 F.3d 114, 115(2nd Cir. 1994) (holding that an overapplication of manure or wastewater to fields by a CAFO owner or operator is a discharge and violation under the meaning of the CWA) (*citing Weber, et al v. Trinity Meadows Raceway, Inc.*, 1996 U.S. Dist. LEXIS 15302 (N.D. Tex. 1996)).

150. By discharging wastewater containing pollutants from the dairies into waters of the United States in violation of their Texas Pollutant Discharge Elimination System permits, Defendants have violated the Clean Water Act. 33 U.S.C. § 1311.

THIRD CAUSE OF ACTION

Cost Recovery and Contribution Under the Texas Solid Waste Disposal Act

151. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

152. Plaintiff and each Defendant is a "person" within the meaning of § 361.003(23) of the Texas Solid Waste Disposal Act (TSWDA).

153. Each Defendant is a person responsible for the disposal of Solid Waste within the meaning of § 361.271 of the TSWDA.

154. Each Defendant owned or operated a dairy, including associated areas used to dispose of waste. Those dairies and the areas used to dispose of waste are "solid waste facilities" within the meaning of § 361.003(36) of TSWDA.

155. By their dairy operations and failure to contain solid waste, each Defendant has arranged for disposal of solid waste into Lake Waco. Lake Waco therefore is a "solid waste facility" within the meaning of § 361.003(36) of TSWDA.

156. The City of Waco has conducted a removal or remedial action within the meaning of § 361.344 of TSWDA. Such removal or remedial action is necessary to address the release or threatened release of solid waste and has been approved by the TCEQ. The TCEQ annually inspects the City of Waco's water treatment operations and compliance records and has approved the City's measures, including the use of powdered activated carbon, to address the taste and odor problems caused by manure-laden waste entering the watershed from the Defendant dairies.

157. In connection with such removal and remedial action, the City of Waco has incurred and will continue to incur significant costs and expenses.

158. The City of Waco has made reasonable attempts to notify all Defendants of the existence of the release or threatened release of solid waste and that the City of Waco intended to take steps to eliminate the release or threatened release. Defendants had actual notice of the existence of releases and threatened releases of manure-laden waste from the Defendant dairies into the watershed and of the City of Waco's efforts to eliminate the release and to address the resulting damages to its drinking water supply. In addition, the City of Waco individually advised Defendants of specific violations, including violations involving unauthorized discharges

of manure-laden waste, and advised each of them of the City's intention to seek civil penalties and injunctive relief to stop ongoing and future releases and other violations. The City of Waco has satisfied all conditions precedent to seeking recovery of such costs and expenses from Defendants, and hereby seeks recovery of such costs and expenses from Defendants.

FOURTH CAUSE OF ACTION

Negligence

159. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

160. Each Defendant has a duty to not pollute the waters of the State of Texas and not to damage the water rights and property of the City of Waco and others. That duty extends to the North Bosque Watershed and Lake Waco, specifically, and to the water rights of the City of Waco and others who have water rights in the North Bosque Watershed and/or Lake Waco. Further, each Defendant has a duty to not engage in other conduct which causes harm to Plaintiff's property or to the public health and environment.

161. The Defendants, jointly and severally, have engaged in conduct and committed acts and omissions which have breached their duties.

162. Defendants were and continue to be negligent in the operation, maintenance or supervision of the their dairy operations. Their negligent acts and omissions include, but are not limited to: applying cow manure and other waste to the land in such quantities, at such frequencies, and under such conditions as to cause that waste to run off of their property, into the North Bosque watershed and ultimately into Lake Waco; failing to follow reasonably prudent agricultural management practices; and failing to take reasonable precautions and use other available waste disposal practices to eliminate excessive waste in the watershed.

163. Each Defendant knew or should have known, and could certainly reasonably foresee, that their activities would result in the pollution of Lake Waco and damage to the owners of water rights in the North Bosque Watershed and Lake Waco, including Plaintiff.

164. Defendants' acts and omissions have combined to directly and proximately cause and/or constitute a substantial factor in causing the past, present and future harm alleged and described hereinabove.

165. As a result of Defendants' negligent acts and omissions, Plaintiff is entitled to recover from Defendants, jointly and severally, for all of the damages proximately caused thereby, and hereby seeks such recovery.

FIFTH CAUSE OF ACTION

Negligence Per Se

166. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 121.

167. Defendants have violated the federal Clean Water Act and the Texas Solid Waste Disposal Act as described hereinabove including in paragraphs 134 through 158. Further Defendants have violated § 26.121 of the Texas Water Code which prohibits unauthorized discharges of waste and pollutants.

168. Each Defendant knew or should have known, and could certainly reasonably foresee, that their activities would result in the pollution of Lake Waco and damage to the owners of water rights in the North Bosque Watershed and Lake Waco to the detriment of Plaintiff.

169. In this manner, Defendants' conduct constitutes negligence per se, which negligence is a proximate cause of damages to Plaintiff, and Plaintiff hereby seeks to recover

from Defendants, jointly and severally, all such costs, expenses and damages.

SIXTH CAUSE OF ACTION

Trespass

170. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 121.

171. In connection with owning, operating and maintaining the Defendant dairies, Defendants intentionally, knowingly, negligently, willfully, and/or recklessly caused the release and discharge of pollution and hazardous substances into the soil, groundwaters and North Bosque Watershed.

172. This pollution and the hazardous substances have entered and continue to enter Lake Waco and the City's treatment works and water system. The pollution and the hazardous substances have entered and continue to enter into water to which the City of Waco has water rights. These invasions were not authorized, approved or agreed to by Plaintiff and constitute unauthorized entries to Plaintiff's property.

173. The trespasses by Defendants have caused and will continue to cause damage to Plaintiff and to Plaintiff's property including Plaintiff's water, Plaintiff's water rights and Plaintiff's water treatment facilities. Therefore, Defendants are jointly and severally liable for the damages, costs and expenses which Plaintiff has incurred and will continue to incur in the future, and Plaintiff hereby sues to recover such damages, costs and expenses.

174. The trespasses by Defendants are repeated and continuing. Accordingly, Plaintiff also seeks injunctive relief to restrain Defendants from engaging in the future in such trespasses.

DEMAND FOR JURY TRIAL

175. Plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

NOW WHEREFORE, Plaintiff requests judgment against Defendants, jointly and severally, on each of Plaintiff's Causes of Action set out above, and Plaintiff further asks the Court for the following relief:

(1) All past monetary damages, costs (including response costs under CERCLA) and expenses incurred by Plaintiff as a result of Defendants' conduct;

(2) All future monetary damages, costs and expenses Plaintiff will incur in the future as a result of Defendants' wrongful conduct and for so long as Plaintiff continues to suffer consequences from Defendants' conduct;

(3) An order of the court establishing and clarifying (a) Plaintiff's water rights and other property interest (b) that such water rights and other property interests are not subject to damage and interference by Defendants and (c) removing the cloud from Plaintiff's title to such water rights and property interests caused by Defendants activities.

(4) Injunctive relief requiring Defendants to cease all acts and omissions which are causing or contributing to the pollution of Lake Waco, and further requiring Defendant to remediate those conditions currently existing which are contributing to that pollution;

(5) Imposition of civil penalties;

(6) Punitive damages reasonable and proper under the law; and

(7) All attorneys' fees, court costs, litigation and investigation expenses, and such other response costs as are allowed by any applicable federal or state law.

Respectfully submitted,

Roy L Barrett

Roy L. Barrett
State Bar No. 01814000
Kerry Haliburton
State Bar No. 08743400
Enid A. Wade
State Bar No.00785157
of
NAMAN, HOWELL, SMITH & LEE, L.L.P.
900 Washington, 7th Floor
P. O. Box 1470
Waco, Texas 76703-1470
(254) 755-4100
FAX (254) 754-6331

Art Pertile, City Attorney
State Bar No. 15815200
City of Waco
City Hall
P.O. Box 2570
300 Austin Avenue
Waco, Texas 76702-2570

ATTORNEYS FOR PLAINTIFF CITY OF WACO

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Third Amended Complaint has been mailed by certified mail, return receipt requested, on this 12th day of November, 2004, to the following:

Ms. Elizabeth Hurst
Mr. Gene F. Creely, II
McGlinchey Stafford, P.L.L.C.
1001 McKinney, Suite 1500
Houston, Texas 77002

CMRRR # 7002 3150 0005 3741 4976

Mr. Ty Buthod
Mr. George Shipley
Baker Botts, L.L.P.
One Shell Plaza, 910 Louisiana
Houston, Texas 77002-4995

CMRRR# 7002 3150 0005 3741 4518

Mr. Russell King
Batjer & Wagstaff
104 Pine Street, Suite 306
Abilene, Texas 79601

CMRRR# 7002 3150 0005 3741 4525

Mr. John Vay
Kelly, Hart & Hallman, P.C.
301 Congress Avenue, Suite 2000
Austin, Texas 78701-2944

CMRRR# 7002 3150 0005 3741 4471

Mr. Fitzhugh Pannill
Law Offices of Fitzhugh Pannill
1412 Niels Esperson Building
808 Travis Street
Houston, Texas 77002

CMRRR# 7002 3150 0005 3741 4495

Mr. Kirk F. Sniff
Strasburger & Price, LLP
901 Mail Street, Suite 4300
Dallas, Texas 75202

VIA FIRST CLASS MAIL

Mr. Stephen W. Stewart
Ms. Celina Romero
Mr. Randall Wilburn
Clark, Thomas & Winters
300 West 6th Street, 15th Floor
Austin, Texas 78701

CMRRR# 7002 3150 0005 3741 4501

Mr. Raymond E. White
Akin Gump Strauss Hauer & Feld L.L.P.
300 West 6th Street, Suite 2100
Austin, Texas 78701

CMRRR# 7002 3150 0005 3741 4464

Mr. James D. Bradbury
Jackson Walker, L.L.P.
301 Commerce, Suite 2400
Fort Worth, Texas 76102

CMRRR# 7002 3150 0005 3741 4457

Roy L Barrett
Roy L. Barrett

LEXSEE 258 FSUPP2D 1263

THE CITY OF TULSA, THE TULSA METROPOLITAN UTILITY AUTHORITY, Plaintiffs, v. 1. TYSON FOODS, INC., 2. COBB-VANTRESS, INC., 3. PETERSON FARMS, INC., 4. SIMMONS FOODS, INC., 5. CARGILL, INC., 6. GEORGE'S, INC., 7. CITY OF DECATUR, ARKANSAS, Defendants.

Case No. 01-CV-0900-EA (C)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

258 F. Supp. 2d 1263; 2003 U.S. Dist. LEXIS 11269

March 14, 2003, Decided
March 14, 2003, Filed

DISPOSITION: Motions ruled upon.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: [**1] For TULSA, CITY OF, TULSA METROPOLITAN UTILITY AUTHORITY, THE, plaintiffs: Kenneth N McKinney, Mark D Coldiron, Robert Leslie Roark, McKinney & Stringer PC, Oklahoma City, OK.

For TULSA, CITY OF, TULSA METROPOLITAN UTILITY AUTHORITY, THE, plaintiffs: Roger Brent Blackstock, Patrick Hoyt Kernan, Michael S Linscott, McKinney Stringer PC, Tulsa, OK.

For TYSON FOODS, INC., COBB-VANTRESS, INC., defendants: R Stratton Taylor, Darrell W Downs, Michael Sean Burrage, Mark H Ramsey, Clinton Derek Russell, Taylor Burrage Foster Mallett Downs & Ramsey, Claremore, OK.

For TYSON FOODS, INC., defendant: Ruth A Wisener, Conner & Winters PLLC, Fayetteville, AR.

For TYSON FOODS, INC., defendant: Robert W George, Kutak Rock LLP, Fayetteville, AR.

For TYSON FOODS, INC., defendant: Craig Sharkey, Tyson Foods Inc, Springdale, AR.

For PETERSON FARMS, INC., defendant: Robert Joseph Joyce, A Scott McDaniel, Chris A Paul, Joyce Paul & McDaniel PC, Tulsa, OK.

For PETERSON FARMS, INC., defendant: Sherry P Bartley, Byron Freeland, Lyn P Pruitt, Mitchell Williams Selig, Little Rock, AR.

For SIMMONS FOODS, INC., defendant: Daniel Richard Funk, Conner & Winters, Tulsa, OK.

For **[**2]** SIMMONS FOODS, INC., defendant: John R Elrod, Fayetteville, AR.

For SIMMONS FOODS, INC., defendant: Vicki Bronson, Conner & Winters PLLC, Fayetteville, AR.

For CARGILL, INC., defendant: John H Tucker, Colin H Tucker, Theresa Noble Hill, Rhodes Hieronymus Jones Tucker & Gable, Tulsa, OK.

For GEORGE'S, INC., defendant: Richard L Carpenter, Jr, Philip James McGowan, Carpenter Mason & McGowan, Tulsa, OK.

For GEORGE'S, INC., defendant: Gary V Weeks, James M Graves, Vince Chadick, Bassett Law Firm, Fayetteville, AR.

For DECATUR, CITY OF, Arkansas, defendant: Linda C Martin, Audra Katharine Hamilton, Doerner Saunders Daniel & Anderson, Tulsa, OK.

For DECATUR, CITY OF, Arkansas, defendant: Mark R Hayes, Little Rock, AR.

For ARKANSAS POULTRY FEDERATION, movant: R Richard Love, III, Conner & Winters, Tulsa, OK.

JUDGES: CLAIRE V. EAGAN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: CLAIRE V. EAGAN

OPINION:

[*1270] ORDER

Plaintiffs City of Tulsa and Tulsa Metropolitan Utility Authority (collectively, referred to as "Tulsa") have filed suit against defendant City of Decatur, Arkansas ("Decatur"), a municipal corporation, and corporate defendants in the poultry industry (collectively **[**3]** referred to as "Poultry Defendants") - Tyson Foods, Inc. ("Tyson"), Cobb-Vantress, Inc. ("Cobb-Vantress"), Peterson Farms, Inc. ("Peterson"), Simmons Foods, Inc. ("Simmons"), George's, Inc. ("George's), and Cargill, Inc.("Cargill"). Tulsa alleges that the acts and omissions of defendants have polluted Lakes Eucha and Spavinaw from which Tulsa draws its water supply. Specifically, excess phosphorus from Poultry Defendants' growers' land application of poultry litter and Peterson's and Decatur's "point source" discharge of wastewater have resulted in "eutrophication" of the lakes, *i.e.*, high levels of algal production in the lakes, which affect water quality. Tulsa seeks cost recovery and contribution from Poultry Defendants under Sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *42 U.S.C. § § 9607(a) and 9613(f)*; and compensatory and punitive damages for intentional nuisance and trespass claims against Poultry Defendants based on Oklahoma statutory and common law n1 and against Peterson and the City of Decatur ("Decatur") under Arkansas common law; and unjust enrichment claims against Poultry **[**4]** Defendants under Oklahoma law and against Peterson and Decatur for the "point source" discharge pursuant to Arkansas law.

> n1 At the January 3, 2003 motion hearing, plaintiffs stated they were pursuing their state law claims against Poultry Defendants for the alleged pollution of Tulsa's water supply by the "non-point" land application of poultry litter under Oklahoma law only, and against Peterson and Decatur for the alleged "point source" pollution of the water supply under Arkansas law only.

I. FACTUAL SUMMARY

The City of Tulsa is a municipal corporation and a political subdivision of the State of Oklahoma. The Tulsa Metropolitan Utility Authority ("TMUA") is an Oklahoma public trust established under *Okla. Stat. tit. 60, § 176 et seq.* for the purpose of operating the water supply system for the express benefit of the City of Tulsa, as beneficiary of the Trust.

The municipal water supply system at issue in this lawsuit includes Lake Spavinaw, Lake Eucha, Lake Yahola, and the City of Tulsa Mohawk **[**5]** Water Treatment Plant ("Mohawk"). These bodies of water are referred to collectively as the "Water Supply." Lakes Spavinaw and Eucha are reservoirs which were formed by plaintiffs by building dams on Spavinaw Creek, which receives water from the Eucha/Spavinaw watershed encompassing approximately 415 square miles (the "Watershed"). Tulsa constructed Lake Spavinaw **[*1271]** in 1924. In 1938, the Oklahoma Water Resources Board ("OWRB") issued to the City of Tulsa a Permit, Grant, License and Certificate to use and apply 205 cubic second feet of the waters of Spavinaw Creek for its present and future needs. As water demands grew, Lake Yahola was constructed in 1948. Finally, in response to increasing water needs and requirements of Tulsa and other northeastern Oklahoma residents, Tulsa constructed Lake Eucha in 1952. n2

> n2 Tulsa was granted an Easement on March 11, 1964 by the Cherokee Tribe of Oklahoma. The Easement conveyed the following rights to the City of Tulsa:
>
> > (1) the right to use certain lands for the storage of water impounded by its dam on Spavinaw Creek (Eucha Dam) to the highest

> elevation (approximately 790 feet above sea level) to which water may be impounded by Eucha Dam;
>
> (2) full and exclusive use and control of said lands below elevation 790 feet above sea level, except as herein provided (exceptions include use by Cherokee Tribe);
>
> (3) use of Eucha Reservoir shall remain under the exclusive control and jurisdiction of the City of Tulsa.

[6]**

Today the water collected in Lake Eucha is discharged directly into Lake Spavinaw where approximately 65-70 million gallons per day are piped directly to Lake Yahola. Water from Lake Yahola is processed at the TMUA-operated Mohawk Water Treatment Plant, from which potable water is furnished to consumers in Tulsa and in northeastern Oklahoma.

Tulsa alleges the Water Supply has been adversely affected by an increase of nutrients - specifically, phosphorus, which has in turn resulted in excessive algae growth. Tulsa contends that the excessive algae growth has caused taste and odor problems with respect to the plaintiffs' Water Supply, and that plaintiffs have incurred and will continue to incur substantial treatment costs and other damages in responding to the taste and odor problems.

The process by which lake water quality is affected through the increase of nutrients is commonly known as "eutrophication." Plaintiffs allege the practices of the Poultry Defendants and Decatur have resulted in the eutrophication of Lakes Eucha and Spavinaw. n3 Specifically, plaintiffs allege that all Poultry Defendants have contributed phosphorus to Lakes Eucha and Spavinaw by virtue of the land application **[**7]** of poultry litter by contract growers located throughout the Watershed with whom the Poultry Defendants have contracted for the raising of poultry. Plaintiffs also allege that Peterson and Decatur have contributed phosphorus to Lakes Eucha and Spavinaw by discharging wastes from Peterson's processing plant through a publicly owned treatment work operated by Decatur.

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n3 Plaintiffs also own and operate a water treatment plant known as AB Jewel which processes water received from Lake Oologah. Lake Oologah receives its water from the Verdigris Watershed which is separate and distinct from the Eucha/Spavinaw Watershed which plaintiffs allege in the instant lawsuit has been adversely affected by the practices of the Poultry Defendants and Decatur. Lake Oolagah is also considered by plaintiffs to be impacted by excess nutrient loading to

> such an extent that it too is in a state of "eutrophication."

Elemental phosphorus is a reactive solid which is highly combustible. Its fumes are extremely poisonous, and when **[**8]** it comes in contact with tissues elemental phosphorus will cause severe burns or intense inflammation. However, elemental phosphorus does not occur free in nature, but rather combines with other elements, most commonly oxygen, to form phosphate. Phosphate is found in all living cells, is safe and is vital to life processes. Poultry litter and waste generated by **[*1272]** poultry processing operations contain phosphorus in the form of a phosphate compound.

Plaintiffs operate several wastewater treatment facilities in and around Tulsa, including sewer lagoons at Lake Eucha. The Eucha Sewer Lagoons were constructed in approximately 1972 to handle human wastewater generated from the campgrounds and cabins around Lake Eucha as well as from an area trailer park. As originally constructed, the Eucha Sewer Lagoons consisted of a discharging sewer lagoon, whereby human wastewater was temporarily held in a lagoon to allow biological activity to occur prior to the wastewater being discharged by plaintiffs directly into Lake Eucha. On several occasions from 1983 until at least 1991, plaintiffs siphoned or decanted sewage from the Eucha Sewer Lagoons into Lake Eucha. As a result of an investigation into **[**9]** plaintiffs' post-1983 discharges from the Eucha Sewer Lagoons into Lake Eucha, the Oklahoma State Department of Health ("OSDH") determined that the plaintiffs had violated Oklahoma law by discharging wastewater into Lake Eucha without a NPDES Permit. Plaintiffs concede the wastewater discharged from the Eucha Sewer Lagoons from 1972 through 1987 contained phosphates, but argue the amount was *de minimus*. In addition, people continue to use Lake Eucha and Lake Spavinaw for recreational activities such as fishing, boating, and camping.

Plaintiffs produce drinking water from the Water Supply that is in compliance with the *Safe Drinking Water Act* and does not present health risks to the residents of Tulsa. There is no current threat to plaintiffs' ability to produce safe drinking water from the Water Supply, although plaintiffs contend that the alleged pollution by Poultry Defendants and Decatur, if left unabated, will lead to more severe problems with the Water Supply, including problems of direct consequence to human health.

Poultry Defendants - Tyson, Cobb-Vantress, Simmons, Peterson, Cargill and George's - are in the business of processing and marketing poultry products to consumers. **[**10]** Generally, the Poultry Defendants contract with independent growers for the care and feeding of poultry ("poultry growers") which the Poultry Defendants subsequently process and market to consumers. Some of those poultry growers own and operate poultry farms which are located within the Watershed.

George's estimates its contract growers

generated inside the Watershed approximately 1,900 tons of poultry litter in 1998, 1,600 tons in 1999, and 1,600 tons in 2002. In 2002, George's estimated that its growers generated 1,600 tons of litter inside the Watershed. As of September 1, 2002, Peterson admits that its contract growers and company farms have produced approximately 40,715,200 birds and an estimated 39,859 tons of litter in the Watershed. During 2001, Cargill admits that its contract growers produced approximately 810,000 turkeys that generated litter in the Watershed. n4

[11]**

[*1273] Each Poultry Defendant, or "integrator," conducts an "integrated" poultry raising operation which is characterized by the following elements: (a) each integrator contracts with growers to raise poultry; (b) it delivers small birds to the growers and retains ownership of the birds at all times; (c) it pays the growers a contract rate to grow the poultry; (d) it provides feed and medication to the growers to care for the birds; and (e) it picks up the birds when they mature and processes them at the integrators' processing plants. The vertically integrated poultry operation allows the integrator to control the genetics and the breeding stock that goes into the chickens that are processed; to have consistency in the final product; and to produce the highest quality finished product possible.

The manure generated by the poultry is excreted onto bedding material purchased by the poultry growers (e.g., wood shavings or rice hulls used by poultry growers to line the floors of growing houses). This combination of poultry manure and bedding material is commonly known as "poultry litter." Poultry litter is rich in phosphorus and nitrogen. It has been the practice of poultry growers in the **[**12]** Watershed and elsewhere to spread the poultry litter on the ground, or to sell it or give it away to neighbors as fertilizer.

The poultry industry has been aware since

n4 Although plaintiffs are contending that all the Poultry Defendants have raised birds and their growers have applied poultry litter on lands within the Watershed, the Court has included in the fact summary only facts which are not in dispute or supported by admissible evidence. "To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of *Rule 56(e)* and the affiant must be a person through whom the exhibits could be admitted into evidence." 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2722, at 382-84 (1998); *Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542 (9th Cir. 1989)*; *Duplantis v. Shell Offshore, Inc., 948 F.2d 187 (5th Cir. 1991)*; *IBP, Inc. v. Mercantile Bank of Topeka, 6 F. Supp. 2d 1258 (D. Kan. 1998)*.

the late 1980s that the land application of poultry litter by contract growers presented a risk of potential environmental impact from nutrient loading resulting from surface water runoff on pastures and fields. The concern was first focused on nitrogen loading and then in the mid to late 1990s, the industry became aware of the potential environmental impact from the phosphorus or phosphates contained in poultry litter.

As early as February 1990, Tyson adopted Dry Poultry Litter Handling Best Management Practices ("BMPs") for its contract growers to educate them about best management practices regarding the storing, land application, and transportation of poultry litter.

In approximately 1999, Peterson held a meeting with its growers to discuss water quality issues in the watershed and litter application. Peterson advised growers that they needed to pay attention to litter application and make sure they applied their litter according to BMBs.

Over the past five years, Cargill claims it has systematically met with **[**13]** its growers in the watershed to provide education, guidance, BMPs, and overall guidance on waste management and disposal practices.

Defendant Decatur is a municipal corporation and a political subdivision of the State of Arkansas. Decatur has approximately 1000-1600 residents. Decatur operates a wastewater treatment plant ("WWTP") to treat wastewater generated by its residents and industry in Decatur.

Defendant Peterson uses this wastewater treatment plant to process poultry waste from its plant in Decatur. Peterson's poultry processing plant in Decatur produces approximately 1.5 million gallons of wastewater per day (not including weekends) which it pre-treats and discharges directly to the Decatur WWTP for final treatment. The phosphorus concentrations in Peterson's effluent range from 9-12 milligrams per liter (mg/L), with an average of 10 mg/L, since the time measurements have been made.

The wastewater that Peterson delivers to the Decatur WWTP constitutes approximately ninety percent of the total volume received and treated by Decatur. Similarly, approximately eighty-five percent of the revenue Decatur receives from the treatment and sale of fresh water comes from Peterson. **[**14]**

[*1274] Decatur's WWTP is a "point source." A "point source" is defined under the *Clean Water Act* ("CWA") as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *33 U.S.C. § 1362(14)*. Decatur's wastewater discharge is permitted by the Arkansas Department of Environmental Quality ("ADEQ"), pursuant to its delegated National Pollution Discharge Elimination System ("NPDES") authority from the United States Environmental Protection Agency ("EPA"). "NPDES" is a term of art from the CWA. Pursuant to the CWA, a point source that discharges pollutants may do so only through a permit issued by the EPA (or through the states as delegated and monitored by the EPA) pursuant to the NPDES section of the CWA. *See 33 U.S.C. § 1311, § 1342.* The NPDES permit for Decatur issued by the ADEQ, pursuant to its authority under the EPA, contains no numerical limits for phosphorus. Decatur is required only to monitor and report its discharge periodically. The average phosphorus concentrations in Decatur's discharge to Columbia Hollow Creek, which flows into Spavinaw Creek, is 6-10 mg/L.

Decatur discharges effluent **[**15]** from its WWTP to Columbia Hollow, which disappears underground and reemerges from the ground several miles before it reaches Spavinaw Creek in Arkansas. This is commonly known as a "losing stream." Columbia Hollow flows into Spavinaw Creek and ultimately into Lake Eucha, which is fifteen miles from the point of discharge.

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to *Fed. R. Civ. P. 56* is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Windon Third Oil & Gas v. FDIC, 805 F.2d 342, 345 (10th Cir. 1986).* In *Celotex,* the Supreme Court stated:

> the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who **[**16]** fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson, 477 U.S. at 247-48.*

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).*

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson, 477 U.S. at 251-52.* The Court may consider **[**17]** only admissible evidence when ruling on a summary **[*1275]** judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985).* In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Comm. for the First Amendment v. Campbell, 962 F.2d 1517 at 1521 (10th Cir. 1992).*

Before the Court are the following motions for summary judgment:

Dkt. # 211	Poultry Defendants Motion for Summary Judgment or in the Alternative for Partial Summary Judgment and Integrated Original Brief in Support
Dkt. # 216	Separate Defendant Simmons Foods Inc.'s Motion for Summary Judgment
Dkt. # 219	[Peterson's] Motion for Summary Judgment
Dkt. # 225	Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure
Dkt. # 226	Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability Under CERCLA
Dkt. # 229	Separate Defendant George's Inc.'s Motion for Summary Judgment
Dkt. # 232	Separate Defendant Tyson Foods, Inc.'s Motion and Integrated Brief in Support of Summary Judgment
Dkt. # 238	Motion of Separate Defendant Cargill Inc's and Brief in Support of Supplemental Motion for Partial Summary Judgment
Dkt. # 239	Separate Defendant Cobb-Vantress Inc.'s Motion and Integrated Brief in Support of Summary Judgment
Dkt. # 240	Defendant City of Decatur's Motion for Summary Judgment and Brief in Support

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[**18]

As the summary judgment motions include most of the same issues, the Court will address the motions according to issue, rather than motion.

III. STANDING OF TMUA

The Court first addresses whether TMUA has standing to bring this action. To have standing, plaintiffs must have "suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical,'" *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* (citations omitted).

Poultry Defendants contend TMUA cannot show it has or will sustain an "injury in fact" and therefore lacks standing to bring this action. Specifically, Poultry Defendants assert the costs incurred in the investigation of and formulation of response actions to address the contamination of the Water Supply and in the treatment of the water to make it potable have been borne by the City of Tulsa, and not TMUA, as TMUA has no revenue, employees or expenses.

Plaintiffs dispute that TMUA has no independent source of revenue and that it has not incurred expenses related to this action. Plaintiffs **[**19]** cite TMUA's Lease **[*1276]** Agreement and Operation and Maintenance Contract ("Lease") by which the City leases to TMUA the water and sewer system assets and establishes an operating fund to collect revenues received by TMUA from the sale of treated water. Further, under the Lease, TMUA incurs indebtedness through operation and maintenance expenses for which it is contractually obligated to reimburse the City. Plaintiffs also contend TMUA contracted with the OWRB for evaluation and monitoring services in conjunction with the Spavinaw-Eucha Clean Lake Study which constitutes part of the costs sought in this lawsuit.

Based on the above, the Court cannot find as a matter of law that TMUA lacks standing to bring this action. n5

n5 For the same reason, the Court denies Poultry Defendants' motion for summary judgment that TMUA is not the real party in interest.

IV. CLAIMS UNDER CERCLA

Plaintiffs seek partial summary judgment on the issue of liability of the Poultry Defendants as responsible parties under CERCLA. **[**20]** (Dkt. # 226). Poultry Defendants also move for partial summary judgment that (1) plaintiffs cannot state a cost recovery claim under *§ 107(a) of CERCLA*; (2) the alleged released phosphate is not a hazardous substance; (3) plaintiffs did not comply with the National Contingency Plan ("NCP") prior to incurring costs; and (4) the alleged offending conduct falls within the "normal application of fertilizer" exclusion. (Dkt. # 211).

A. Cost Recovery and Contribution

Plaintiffs bring claims for cost recovery under *§ 107(a)* and for contribution under *§ 113(f) of CERCLA, 42 U.S.C. § § 9607(a) and 9613(f)*, respectively. To establish a *prima facie* case of liability under either section, plaintiffs must prove the following elements:

> (1) the defendants are in one of four categories of covered persons;
>
> (2) there has been a release or threatened release of a hazardous substance from a site which is a covered facility;
>
> (3) the release or threatened release caused the plaintiffs to incur costs;
>
> (4) plaintiffs' costs are necessary response costs; and
>
> (5) plaintiffs' response action or cleanup was consistent with the NCP.

[21]** *42 U.S.C. § 9607(a)*; *Morrison Ent. v. McShares, Inc., 302 F.3d 1127, 1135-36 (10th Cir. 2002)*; *Pub. Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1181, n.5 (10th Cir. 1999)*. "Covered persons" under *§ 107(a)*, otherwise known as "potentially responsible parties" or "PRPs," include the following:

> (1) the owners and operators of a facility;
>
> (2) any person who at the time of the disposal of the hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
>
> (3) any person who arranged for the treatment or disposal of a hazardous substance at the facility; and
>
> (4) persons who transported hazardous substances to the facility.

See 42 U.S.C. § 9607(a).

A cost recovery action under *§ 107(a)* imposes strict liability on PRPs for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan [("NCP")] [and] any other necessary costs of response incurred by any other person consistent with the [NCP]." *42*

U.S.C. § 9607(a)(4). **[**22]** "It is also well settled that *§ 107* imposes joint and several liability on PRPs regardless of fault." *United States v. Colo. & Eastern R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995).*

> **[*1277]** Due to the impossibility of determining the amount of environmental harm caused by each party where wastes of varying and unknown degrees of toxicity and migratory potential have mixed, the courts have been reluctant to apportion costs between PRPs, and hence have adopted the rule that "damages should be apportioned only if the *defendant* can demonstrate that the harm is divisible."

Id. (quoting *O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989)).* As the difficult burden of showing divisibility of harm is on the defendant PRP(s) in a cost recovery action, PRPs rarely escape joint and several liability. *Id.; Morrison, 302 F.3d at 1133* ("The burden rests on a defendant who has only contributed a fraction of the waste to show that the harm from his actions is divisible from the harm caused by the waste of other defendants.").

To avoid saddling an individual PRP with the entire liability for cost recovery, Congress amended **[**23]** CERCLA in 1986 to recognize a right of contribution which allows "any person [to] seek contribution from any other person who is liable or potentially liable under *section 9607(a)* [107(a)] . . . during or following any civil action under . . . *section 9607(a).*" *42 U.S.C. § 9613(f).* Accordingly, under *§ 113(f)*, an individual PRP who has incurred the entire cost of cleanup of a site may seek contribution from other PRPs. Although *§ 113(f)* does not create a new cause of action and "*is* an action under *§ 107*," liability among the PRPs under *§ 113(f)* is necessarily several, rather than joint and several as in a cost recovery claim under *§ 107*, and is allocated according to equitable factors. n6 *Sun Co., Inc. v. Browning-Ferris, Inc., 124 F.3d 1187, 1191 (10th Cir. 1997)* ("Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in *§ 107* . . . , but is governed by the equitable apportionment principles established in *§ 113(f)*"). The burden of proof is on the party seeking apportionment to show that it should be granted. *Colo. & Eastern R.R., 50 F.3d at 1536* **[**24]** (citing H.R. Rep. No. 99-253 (III), at 19 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3038, 3042).

n6 Although not an exhaustive or exclusive list, the following "Gore Factors" are considered by many courts in determining apportionment:

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a

> hazardous waste can be distinguished;
> (ii) the amount of the hazardous waste involved;
> (iii) the degree of toxicity of the hazardous waste involved;
> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
> (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.

Colo. & Eastern R.R., 50 F.3d at 1536 n. 5. The district court may consider one or several factors depending on the totality of the circumstances. *Id. at 1536.*

[25]**

Poultry Defendants argue that plaintiffs are PRPs because they have operated sewer lagoons at Lake Eucha which discharged human wastewater into the lake from 1972 through 1983, and on several occasions from 1983 until 1991 contributed to the external loading of phosphorus in the lakes by siphoning or decanting sewage from the lagoons into the lake; therefore, as PRPs, plaintiffs cannot bring a cost recovery claim under *§ 107(a)*. n7 Although **[*1278]** plaintiffs emphasize that their contribution to external phosphorus loading of the lakes is *de minimus*, plaintiffs concede that they are PRPs, and thus under the Tenth Circuit's recent decision in *Morrison Ent. v. McShares, Inc., 302 F.3d 1127 (10th Cir. 2002)*, cannot maintain a cost recovery action under *§ 107(a)* of CERCLA. *302 F.3d at 1135* ("Because [plaintiff] is a PRP, it may not proceed with two independent suits under both *§ § 9607 and 9613(f)*, but instead may only proceed with an action for contribution under *9613(f)*.").

> n7 Although not explicitly stated in the briefs, the Court assumes Poultry Defendants are classifying plaintiffs as "operators" of a facility, as they argue in defense of plaintiffs' common law claims that plaintiffs are not "owners" of the Water Supply.

[26]**

In *Morrison*, the Tenth Circuit rejected the landowner plaintiff's "innocent PRP" argument that it should be allowed to bring a cost recovery claim under *§ 107(a)* as it had no responsibility for the contaminating spill at issue. *302 F.3d at 1134-35*. In so finding, the Court declined to follow the Seventh Circuit, which held that a PRP, not entitled to a defense under *§ 9607(b)*, could nonetheless proceed under *§ 107(a)* if the PRP is a landowner who is sufficiently innocent. *302 F.3d at 1134* (citing *NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 784 (7th Cir. 2000))*.

> There may be a superficial attraction to allowing "innocent PRPs" to proceed under *§ 9607(a)*. Because these landowners had nothing to do with the release of hazardous waste, it seems reasonable that they should not be forced to bear any of the costs of cleanup whatsoever. Under *§ 9607(a)*, if the landowners succeed in showing that the defendants are liable, the entire cost of cleanup would be shifted automatically to the defendants, because they are strictly, jointly, and severally liable. Under *9613(f)*, on the other hand, even if the landowners succeed in showing **[**27]** that defendants are liable, the landowners face the additional step of dividing liability among the various parties (including, potentially, the plaintiffs) according to equitable factors.
>
> Thus, under *§ 9613(f)*, there is a theoretical risk that "innocent PRPs" might bear some of the costs of liability. Nonetheless, we see little risk of this result occurring. If the plaintiffs are truly "innocent PRPs," then there should be little difficulty in making the additional required showing that the defendant PRPs should bear the entire cost under the equitable factors. . . .
>
> In addition, it might be unfair to allow "innocent PRPs" to proceed under *§ 9607* and transfer all of the potential liability to other PRPs because there may be "orphan shares" of liability for bankrupt or judgment-proof defendant PRPs that should be equitably divided among the plaintiffs and other defendant PRPs. . . . Of course, the defendant PRPs may attempt to reimpose that liability on the plaintiff PRPs (or other PRPs) through a new contribution action under *§ 9613(f)*, but that result would lead to a "chain reaction of multiple, and unnecessary lawsuits."

Id. at 1134-35 (citations omitted). **[**28]** n8 n8 One commentator who disagrees with the "contribution only" analysis for PRPs points out that "innocent PRPs" should be able to bring a *§ 107(a)* claim because they are acting as volunteers in the cleanup and as such cannot bring a contribution action. In addition, not allowing an "innocent PRP" to seek full recovery of response costs does not promote CERCLA's goal to encourage the prompt and voluntary cleanup of hazardous sites. Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties, 21 Harv. Envt'l L. Rev. 83 (1997).*

Given the Tenth Circuit's analysis in *Morrison*, if "innocent PRPs" cannot bring a cost recovery claim under *§ 107(a)*, plaintiffs, as admitted "*de minimus*" contributors of phosphorus to Lake Eucha, certainly cannot. However, plaintiffs can **[*1279]** proceed for contribution under *§ 113(f)(1)*. Based on the above, the Court grants Poultry Defendants' summary judgment on plaintiffs' *§ 107(a)* **[**29]** *CERCLA* claim. (Dkt. # 211). The following analysis of CERCLA issues, therefore, pertains only to plaintiffs' contribution claim under *§ 113(f)*.

B. Facility

"Facility" is defined under CERCLA as

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, *pond*, lagoon, *impoundment*, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) *any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located*; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (emphasis added). Plaintiffs rely on subsection (B). Although plaintiffs originally pleaded the "facility" was the Water Supply, plaintiffs propose the entire Watershed be designated as a "facility" because the hazardous substance at issue, phosphorus, is deposited or can be found virtually throughout the Watershed where poultry litter has been land applied by the poultry growers and their neighbors to whom the litter is sold or given away. n9

n9 More specifically, plaintiffs argue the facility is the "entire Watershed and the water supply system, including all the land where the Poultry Defendants apply their manure and litter, the lakes and creeks which receive the runoff from those pastures and the effluent from Decatur's and Peterson's

> processing plants, and the final water supply reservoirs which hold water for treatment by the City of Tulsa water treatment plant." Plaintiffs' Summary Judgment Motion on CERCLA, p. 11 (Dkt. # 226). The Court notes, however, that plaintiffs' CERCLA claim for contribution has not been brought against Decatur or Peterson for the effluent from the WWTP or Peterson's processing plant. *See* First Amended Complaint, First Claim for Relief (Dkt. # 93).

[30]**

Poultry Defendants object that "facility" cannot be so broadly defined, as the Watershed encompasses more than 415 square miles of land and plaintiffs cannot show the presence of phosphates or phosphorus throughout the entire Watershed. Further, although the poultry growers operate farms on various tracts of land within the Watershed, the farms do not comprise a majority of the land in the Watershed. Poultry Defendants urge that plaintiffs' "re-designation" of the facility as the Watershed is simply an attempt to avoid a defect in their CERCLA claim - the lack of a causal nexus between the poultry growers' land application of poultry litter and the alleged contamination of the Water Supply.

The definition of "facility" under *§ 9601(9)(B)* is broad enough to include both the initial site where a hazardous substance is disposed of and additional sites to which the substances have migrated following the initial disposal. *Nutrasweet Co. v. X-L Eng'g Corp., 933 F. Supp. 1409 at 1418.* In *Nutrasweet*, plaintiff sued a neighboring manufacturer that had dumped hazardous substances on its own property which moved by way of surface and ground water onto plaintiff's property. The district court found **[**31]** that hazardous substances came to be located on both the plaintiff's and manufacturer's property and therefore, both met the definition of "facility." *Id. at 1417-18* and n.3; *see also U.S. v. Brighton, 153 F.3d 307, 313 (6th Cir. 1998)*("The words of the statute suggest that the bounds of a facility should be defined at least in part by the bounds of the contamination. . . . However, an area that cannot be reasonably or naturally divided into multiple parts or **[*1280]** functional units should be defined as a single 'facility,' even if it contains parts that are non-contaminated.").

Also, contrary to Poultry Defendants' argument, CERCLA does not impose a causation element as a predicate to liability when a defendant falls into one of the classes of liable parties. *Tosco Corp. v. Koch Indus., Inc., 216 F.3d 886 at 891 (10th Cir. 2000)* ("To establish liability under *§ 9613(f)*, it is sufficient for the plaintiff to establish a connection between a particular defendant and the incurred response costs *vis a vis* the defendant's identification as a responsible person as defined in *§ 9607(a)*."). Neither is it required that the facility be co-extensive with the **[**32]** responsible person's property. *Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc., 811 F. Supp.*

1421, 1431 (E.D. Ca. 1993) ("nothing in CERCLA supports the notion that facility must be defined by or be coextensive with an owner's property lines."); *Nutrasweet, 933 F. Supp at 1420.* ("Nutrasweet does not have to prove that X-L's release of hazardous waste onto the portion of its own facility adjacent to NutraSweet's property actually and physically migrated and contaminated plaintiff's property; NutraSweet need only show that the release or threatened release of hazardous substances from the facility caused it to incur response costs."); *U.S. v. Hardage, 761 F. Supp. 1501 (W.D. Okla. 1990).*

Although the definition of "facility" is expansive enough to include the Watershed within its scope, the factual record before the Court on plaintiffs' motion for partial summary judgment is insufficient. The documents which plaintiffs cite in support of their statement of facts regarding the land application of poultry litter, *i.e*, the alleged "disposal" of phosphorus, within the Watershed are either unauthenticated documents or responses **[**33]** to interrogatories which at best admit only to the generation of, and not the land application of, poultry litter in the Watershed. Accordingly, the Court cannot make any finding regarding the boundaries of the "facility" at this juncture.

C. Arranger Liability

Plaintiffs contend Poultry Defendants are liable for the costs plaintiffs have incurred in the cleanup of the lakes as they acted as "arrangers" for their growers' "disposal" of phosphorus in the poultry litter into the Watershed. An "arranger" is defined under CERCLA as "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person by any other party or entity, at any facility . . ." *42 U.S.C. § 9607(a)(3).* Plaintiffs cite the undisputed facts that Poultry Defendants retain ownership of the birds, provide feed and medication and pick up and process the birds when they are ready. They contend Poultry Defendants regularly oversee the growing conditions and have established BMPs to direct their growers as to the application of poultry waste generated by the birds they own, and allow their growers to spread **[**34]** the waste and litter on their own land or to sell it to others in the watershed who apply it to the land. n10

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n10 Plaintiffs also argue separate defendant Peterson "arranges for" Decatur to treat and dispose of the wastewater from Peterson's poultry processing plant knowing Decatur's treated effluent contains 6-10 mg/l per day of phosphorus, and whenever Decatur is fined for exceeding its permit limitations on ammonia, suspended solids, and BODs, Peterson reimburses Decatur for the fine. These purported "undisputed" facts are not relevant, however, as plaintiffs have not brought a CERCLA claim against Peterson for the effluent discharge

> from its plant or the WWTP. Rather, plaintiffs base their CERCLA claim solely on the Poultry Defendants' arranging for the "disposal" of phosphorus through their growers' land application of poultry litter. First Amended Complaint, First Claim for Relief (Dkt. # 93).

[*1281] Poultry Defendants dispute that the poultry litter is owned by them or that they control the growers' land **[**35]** application of litter. They cite their contracts with the growers as undisputed evidence that the manure and wastes generated by poultry while under the care of the growers is vested in the growers and therefore they lack authority to prohibit the growers from land application of litter.

"Arrange for" is not defined under CERCLA, although "disposal" is. "Disposal" includes:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste or any constituent thereof may enter the environment . . . or [be] discharged into any waters, including ground waters.

42 U.S.C. § § 6903(3) and 9601(29). As the Tenth Circuit has yet to interpret the phrase "arrange for," the Court looks to the decisions of other circuits. *Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1523 (D. Colo.1996).*

The most restrictive interpretation is offered by the Seventh Circuit in *Amcast Ind. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993).* In *Amcast*, Elkhart, a copper fittings manufacturer, contended Detrex, the seller of trichloroethylene **[**36]** ("TCE") used in Elkhart's manufacturing process, was liable for the TCE contamination of groundwater at the Elkhart plant due to accidental spills which occurred during the unloading of TCE from trucks owned by Detrex and those of its common carrier, Transport Services, into Elkhart's storage tanks. Focusing exclusively on Detrex's intent in hiring Transport Services to transport its TCE to Elkhart, the Seventh Circuit concluded Detrex was not liable for the spills which resulted from loadings from Transport Services' trucks, as Detrex did not "arrange for" those accidental "disposals."

> Although the statute defines disposal to include spilling, the critical words for present purposes are "arranged for." The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground. . . . When the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a

> useful product, he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal **[**37]** doctrines. . . . We conclude that Detrex was liable under [CERCLA] for the spillage from its own trucks . . . but not the spillage from the trucks of the common carrier that it hired.

Id. at 751. The Seventh Circuit thus narrowly interpreted "arranged for" as requiring evidence of intent to arrange for the disposal of a hazardous substance. *Id.*

The Eighth Circuit, however, looked beyond defendants' characterization of their intent "to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance." *U.S. v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1381 (8th Cir.1989)*. In *Aceto*, the United States and the State of Iowa alleged the defendant pesticide manufacturers who hired a formulating company to mix and package pesticides for them were liable for cleaning up the formulator's site because defendants owned the pesticides and the generation of pesticide waste was **[*1282]** inherent in the formulation process. *Id. at 1379*. Defendants moved to dismiss, arguing the complaint alleged only an intent to arrange for formulation of the pesticides, not an intent to arrange for disposal **[**38]** of pesticide wastes. *Id. at 1380*.

In interpreting the statutory language, the Eighth Circuit noted the two essential purposes of CERCLA: (1) to provide for prompt and effective responses to the problem of hazardous wastes and (2) to insure responsible parties bear the costs and responsibility for remedying harmful conditions they caused. *Id.* To further the second purpose, the court determined that the allegations that defendant pesticide manufacturers owned the pesticides throughout the formulating process and the formulation was performed for the benefit of the defendants were sufficient to state a claim that the manufacturers "arranged for" the disposal of the wastes generated by that process. *Id. at 1382* ("Any other decision, under the circumstances of this case, would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA."). *See also U.S. v. Hercules, Inc., 247 F.3d 706, 720, 721 (8th Cir.2001)* (adopting a "totality of the circumstances" test as to whether the facts of a given case fit within CERCLA's "overwhelmingly remedial **[**39]** scheme," and finding when ownership is lacking, arranger liability "requires either control over, or 'some level of participation in,' activities related to the arrangement of hazardous waste disposal.").

In *S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 407-08 (11th Cir. 1996)*, the Eleventh Circuit affirmed its rejection of a *per se* rule to determine whether a party "arranged for" the disposal of a hazardous substance, noting that courts should instead "focus on all of the facts in a particular case." *Id. at 407* (citing *Fla. Power & Light Co. v. Allis Chambers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990))*. The court found that "while factors such as a party's knowledge (or lack thereof) of the disposal, ownership of the hazardous substances, and intent are relevant to determining whether there has been an 'arrangement' for disposal, they are not necessarily determinative of liability in every case." *84 F.3d at 407*.

In *Montalvo*, aerial spraying services ("sprayers") hired to spray landowners' crop and pasture land with pesticides were found jointly and severally liable for the cleanup of their airstrip and **[**40]** storage site and sought contribution from the landowners. The sprayers alleged the landowners owned the pesticides which were mixed and loaded onto the planes and should have known spills and rinsing out of the tanks were necessary incidents of the application process. Distinguishing the allegations in *Aceto*, the *Montalvo* court found that it would stretch the meaning of "arranged for" too far to hold the landowners liable.

> Whereas it was possible to infer the chemical manufacturers in *Aceto* knew about the creation of hazardous wastes given the service they were being provided, we cannot infer the Landowners had similar knowledge that spraying their crop and pasture lands with pesticides entailed the spilling of pesticides and draining of contaminated rinse water. Without this knowledge, the Landowners cannot be said to have acquiesced to the Sprayers' disposal of the wastes.

Id. at 408-09. Thus, the Eleventh Circuit found the landowners did not arrange for the disposal of the pesticides.

The Court is persuaded that the appropriate analysis of arranger liability is the "case-by-case" approach set forth in *Montalvo. See also Mathews v. Dow Chemical* **[*1283]** *Co., 947 F. Supp. 1517, 1525 (D. Colo.1996)* **[**41]** (adopting the *Montalvo* test as "most faithful to the statutory language and purposes of CERCLA") and *United States v. Friedland, 173 F. Supp. 2d 1077 (D.Colo. 2001)* (same). Applying the factors therein, the Court cannot determine as a matter of law whether the Poultry Defendants have "arranged for" the disposal of poultry litter. There are fact questions regarding Poultry Defendants' arrangement with their growers, which include ownership, authority to control, and participation in the alleged disposal of poultry waste through land application of poultry litter. Therefore, the Court denies plaintiffs motion for summary judgment on Poultry Defendants' arranger liability.

D. Hazardous Substance

Poultry Defendants seek summary judgment that plaintiffs cannot state a CERCLA claim because they cannot show a release of a "hazardous substance." While

Poultry Defendants admit that phosphorus is a hazardous substance under CERCLA, they argue that the pertinent substance in poultry litter is phosphate, which is not a hazardous substance. Plaintiffs counter that the phosphorus is a constituent of phosphate and, therefore, phosphate contains a hazardous substance under **[**42]** CERCLA.

A hazardous substance is defined under CERCLA as "any toxic pollutant" listed under *33 U.S.C. § 1317(a)* and any hazardous substance under *33 U.S.C. § 1321(b)(2)(A)* of the CWA, "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [*42 U.S.C.A. § 6921*]," and includes substances listed under the *Clean Air Act*, the *Resource Conservation and Recovery Act ("RCRA")* and *§ 102 of CERCLA. 42 U.S.C. § 9601(14)*. A substance is considered hazardous under CERCLA if it falls under *§ 9601(14)* or is listed in the table of CERCLA hazardous substances found at *40 C.F.R. § 302.4. B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 at 1199-1200 (2d Cir. 1992)*. Phosphorus is listed as a hazardous substance under both the CWA and CERCLA. *See 40 C.F.R. Table 116.4A* pursuant to *33 U.S.C. § 1321(b)(2)(A)* of the CWA and *40 C.F.R. Table 302.4*, pursuant to *CERCLA § 102, 42 U.S.C. § 9602*. There is no separate listing for phosphate.

It is undisputed that **[**43]** elemental phosphorus is highly combustible, poisonous and so reactive it does not occur free in nature, and that phosphate is found in all living cells, is safe and vital to life processes. The parties further agree the EPA has designated separate Chemical Abstract Registry Numbers ("CASRN") for phosphorus (7723140) and phosphate (1465442).

Poultry Defendants do not dispute that phosphorus is listed as a hazardous substance under CERCLA and appears in Table 302.4. Rather, they argue there is no listing for "Phosphorus and Compounds" or "phosphates," so the phosphate at issue here is not a hazardous substance, citing *United States v. Alcan Aluminum Corp., 964 F.2d 252 (3rd Cir.1992)*. n11 They also cite the fact that the EPA has assigned separate CASRNs for phosphorus (7723140) and for phosphates (14265442) as evidence the EPA did not intend to include phosphates when listing phosphorus. Finally, **[*1284]** they reason elemental phosphorus is a "hazardous" substance while phosphate is a naturally-occurring compound ubiquitous in foods we eat and discard every day. n12

n11 Poultry Defendants contend that *Alcan* stands for the proposition that a listing in Table 302.4 includes broad generic classes of compounds when the listing is in the following format: "Element X and its compound" such as in the generic listings for "Cadmium and Compounds," "Chromium and Compounds," etc. As phosphorus is not listed as "Phosphorus and Compounds," they argue that

> phosphate, as a compound of phosphorus, is not included. **[**44]**

n12 The plaintiffs refer to defendants' exhibit listing over 1100 food products with phosphorus-containing compounds as the "broccoli exhibit."

In *B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992)*, the Second Circuit affirmed the district court's denial of summary judgment, holding that CERCLA does not exempt municipal waste nor does it exclude household solid waste from its definition of hazardous substance. *Id. at 1197*. The court explained that "[a] substance need only be designated as hazardous under any *one* of the four environmental statutes or under *Table 302.4* to be a hazardous substance under CERCLA." *Id. at 1200* (emphasis in original). Also, "the concentration of hazardous substances in municipal solid waste -- regardless of how low a percentage -- is not relevant in deciding whether CERCLA liability is incurred." *Id.* The CERCLA statute comprehensively defines hazardous substances, excluding specifically only oil and natural gas, so that

> municipal waste need not be listed by name -- instead of its constituent **[**45]** components -- to fall within the Act. For us to consider the whole separate from its hazardous constituent parts would be to engage in semantic sophistry. When a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability ...Liability under CERCLA depends only on the presence in any form of listed hazardous substances.

Id. at 1201 (citations omitted); *see also B.F. Goodrich v. Betkoski, 99 F.3d 505, 515-16 (2d Cir. 1996)* ("It is enough that a mixture or waste solution contain a hazardous substance for that mixture to be deemed hazardous under CERCLA."); *Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565 at 1573 (9th Cir. 1995)*(holding that even if a product is not specifically listed as a hazardous substance, if its components include hazardous substances, the product is regulated by CERCLA); *Eagle-Picher Indus. v. EPA, 245 U.S. App. D.C. 196, 759 F.2d 922, 930-31 (D.C. Cir.1985)* (finding that mining wastes and fly ash need not be specifically listed as they contain some hazardous substances).

In *United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992)*, **[**46]** the Third Circuit rejected defendant's argument that its disposed emulsion which contained only trace levels of generic compounds listed in Table 302.4 was not a hazardous substance under CERCLA as it posed "no real threat to the environment." *Id. at 261-64*. Defendant argued the level of hazardous substances in its emulsion was less than that in dirt and the trial court's refusal to read any quantitative requirement of the listed constituents into "hazardous substance" would make "virtually everything in the universe" a hazardous substance. n13 *Id. at 259-60.* In affirming the trial court, the Third Circuit stated:

> **[*1285]** Alcan's argument, though superficially appealing, is flawed. First, as noted above, the Government responds to "releases" that threaten environmental safety. Thus, it is the *release alone* that must justify the response costs, not the particular waste generated by one given defendant. Here, there is no question but that a release occurred. Second, the fact that a single generator's waste would not in itself justify a response is irrelevant in the multi-generator context, as this would permit a generator to escape liability where **[**47]** the amount of harm it engendered to the environment was minimal, though it was significant when added to other generator's waste. Accordingly, we find that the district court's construction of the statute furthers important environmental goals.

Id. at 264.

CERCLA is a remedial statute that courts construe liberally to effectuate its broad response and reimbursement goals. *Murtha, 958 F.2d at 1198*; *Alcan, 964 F.2d at 258.* **[**48]** Based on the above cases, the Court concludes the EPA intended to include phosphorus compounds, such as phosphates, in listing phosphorus in *Table 302.4.* Whether expressed as PO4 or another chemical combination of phosphorus and oxygen, phosphates contain phosphorus. Since elemental phosphorus is highly combustible, poisonous and so reactive that it does not occur free in nature (an

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n13 The Third Circuit cited the following passage from *United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 538 (N.D.N.Y. 1991)* with approval:

> The corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable."

Alcan, 964 F.2d at 260.

undisputed fact in this case), the EPA likely contemplated liability for phosphorus in real, not theoretical, releases. n14 Further, as recognized by the Third Circuit, a compound does not have to be toxic or be released in any threshold quantity to be classified as a hazardous substance under CERCLA. *Alcan, 964 F.2d at 261-64*. Therefore, the Court finds that the phosphorus contained in poultry litter in the form of phosphate is a hazardous substance under CERCLA.

> n14 The Court also notes the discussion of phosphates in cases predating CERCLA which involved local legislation limiting the sale of phosphate detergents. *See e.g., Procter & Gamble Co. v. Chicago, 509 F.2d 69 (7th Cir. 1980)*; *Soap & Detergent Assoc. v. Clark, 330 F. Supp. 1218 (S.D. Fla. 1971)*; *Colgate-Palmolive Co. v. Erie County, 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971)*. These cases recognized the view of the scientific community that "phosphorus" was the limiting nutrient in the eutrophication of water bodies and the reduction of "phosphate" was the "logical starting point for reclamation of the . . . surface and underlying water systems." *Clark, 330 F. Supp. at 1221*.

[49]**

E. Consistency With the NCP

Compliance with the NCP is an essential element of plaintiffs' *§ 113(f)* claims under CERCLA. *Pub. Serv. Co. of Colo. v. Gates Rubber Co. ("PSCo"), 175 F.3d 1177 at 1181 (10th Cir. 1999)* ("Both [*107(a)* and *113(f)*] claims require compliance with the NCP."); *County Line Inv. Co. v. Tinney, 933 F.2d 1508 at 1511 (10th Cir. 1991)* (summary judgment to defendants appropriate when "the undisputed evidence established that [plaintiff's] costs in investigating and closing [a hazardous site] were not incurred 'consistent with the national contingency plan.'"); *United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992)*.

The NCP is the EPA's guide for a "CERCLA-quality cleanup" and is set forth in *40 C.F.R. § 300.700*. *County Line, 933 F.2d at 1514*. The regulations provide: "A private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in *substantial compliance* with the applicable requirements." *40 C.F.R. § 300.700(c)(3)(i)* (emphasis added). NCP requirements **[**50]** are as follows:

> **[*1286]** Under *§ 300.700* . . . a response action will be "consistent with the NCP" if the private party substantially fulfills requirements for (1) worker health and safety; (2) documentation of cost recovery; (3) permit requirements; (4) identification of applicable or relevant and appropriate

> requirements (ARARs): (5) remedial site evaluation; (6) remedial investigation/feasibility study and selection of remedy (RI/FS), and (7) providing "an opportunity for public comment concerning the selection of the response action" which might include preparing a formal community relations plan, ensuring opportunities for public involvement, and disseminating information to the community.

PSCo., 175 F.3d at 1182. The required level of consistency with the NCP depends on whether the response is characterized as a removal or remedial action. *Id.*

> Generally, a removal action costs less, takes less time, and is geared to address an immediate release or threat of release. In broad contrast, a remedial action seeks to effect a permanent remedy to the release of hazardous substances when there is no immediate threat to the public health. Remedial **[**51]** actions usually cost more and take longer. Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed.

Id. (citations omitted.).

Poultry Defendants contend plaintiffs' response action is remedial in nature and plaintiffs cannot show they have complied with requirements (5) through (7). In support, Poultry Defendants cite the testimony of plaintiffs' expert, Ben Costello, that: (1) he could not identify a specific information repository of which the public was notified and by which it would have had access to the proposed plan and supporting analysis, or any other documentation with respect to the alleged response action, Exhibit O, p. 227 (Dkt. # 211); (2) to his knowledge, plaintiffs never prepared a written proposed plan identifying their preferred remedial alternative or disseminated to the general public any such plan, Exhibit O, p. 231 (Dkt. # 211); (3) he had not seen plaintiffs' field sampling plan or their quality assurance plan with respect to the response action, Exhibit O, pp. 232-33 (Dkt. # 211); (4) his investigation of plaintiffs' response actions suggests that, at the time plaintiffs were engaging **[**52]** in actions for which they now seek response costs, no one with responsibilities for the alleged "response actions" was endeavoring or seeking to intentionally comply with the detailed and mandatory prerequisites for recovery under CERCLA and the NCP, Exhibit O, p. 234 (Dkt. # 211). Poultry Defendants argue that as a result of these deficiencies, plaintiffs cannot show their response action was consistent with the NCP.

Plaintiffs, on the other hand, assert their response was a removal action and was in "substantial compliance" with the NCP.

Because Tulsa and the TMUA are public bodies, their investigation of and response to the pollution of the Water Supply have mandated several opportunities for public access and comment. Specifically, the TMUA meetings pertaining to incurrence of costs to install GAC filters at the Mohawk Treatment Plant on March 8, 2000, to engage the OWRB to study the lake processes, causes of degradation, and available alternatives on August 27, 1997, and to engage Dr. Dan Storm to model phosphorus loading in the Watershed on May 13, 1998, required prior notice and were open to the public. Exhibit G (Dkt. # 273). Taste and odor issues and possible solutions were **[**53]** routinely and extensively discussed at TMUA operations committee meetings which required prior notice and were open to the public. Exhibit H **[*1287]** (Dkt. # 273). Immediately after the Clean Lakes Report was issued by the Oklahoma Corporation Commission ("OCC") in 1997, plaintiffs initiated a Watershed Management Team with three separate working groups to study watershed issues and develop a strategy for addressing them, which involved thirty private and public entities, state and federal government agencies, and academic institutions, including representatives from Tyson, Peterson, Simmons, the Poultry Federation and contract poultry growers. Exhibit I (Dkt. # 273). These working groups met regularly from 1997 through Spring 2001 to discuss all aspects of the watershed issues. Exhibit J (Dkt. # 273). Even if this extensive public involvement were somehow deficient, the direct and pervasive involvement of state regulatory bodies, evidenced by the OCC Clean Lakes Report (Exhibit K) and the OWRB Report of the Eucha/Spavinaw Lake System (Exhibit L) serves as a substantial equivalent. Finally, plaintiffs contend that the OCC Clean Lakes Report and the OWRB Report, as well as a private company **[**54]** study of alternatives in the Analysis of Taste and Odor Occurrences, dated April 1999 (Exhibit M), set forth the substantially equivalent procedures undertaken by plaintiffs for remedial site inspection, feasibility study and selection of remedy.

As the nature of plaintiffs' response action and its degree of compliance with the NCP is in dispute, the Court will reserve ruling on both issues until the completion of the evidence in the bifurcated trial before the Court on plaintiffs' CERCLA claim.

F. The "Normal Application of Fertilizer" Exclusion

A "release" is defined in CERCLA as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . but excludes . . . (D) the normal application of fertilizer." *42 U.S.C. § 9601(22)*. n15 Poultry Defendants seek summary judgment that the land application of poultry litter is a "normal application of fertilizer." Plaintiffs concede that animal waste may be used as fertilizer under proper circumstances, but argue that the land application of poultry litter by

Poultry Defendants' growers exceeds the "normal" application **[**55]** of fertilizer.

To effect CERCLA's goals of environmental protection and remediation, the definition of "release" has been broadly construed by courts. *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 at 1152 (1st Cir. 1989).* **[**56]** Consequently, exceptions from liability under CERCLA are narrowly construed. *See Idaho v. Hanna Mining Co., 882 F.2d 392, 396 (9th Cir. 1989).* The exclusion of fertilizer from the CERCLA definition of "release" is for the "*normal* application of fertilizer." CERCLA itself does not define what a "normal" application of fertilizer is and the Court is unaware of any decision interpreting the exclusion. When **[*1288]** a term is not defined in a statute, the Court "must construe the term in accordance with its ordinary meaning." *United States v. Telluride Co., 146 F.3d 1241, 1245 (10th Cir. 1998).*

Plaintiffs cite the definition of "normal" as "conforming with, adhering to, or constituting a norm, standard, pattern, level or type." American Heritage College Dictionary (3rd ed. 1993). This definition is of little assistance to the Court as it is the "norm" which is in dispute. Poultry Defendants contend that the norm is the practice of their growers, while plaintiffs suggest that the norm is poultry litter application which does not exceed a certain level of phosphorus in the soil.

What is clear to the Court is that any interpretation of "normal application of **[**57]** fertilizer" cannot be made out of

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n15 This exclusion is discussed in a Senate Report that attempts to define some of its terms:

> Certain feedstocks used to produce fertilizer (nitric acid, sulfuric acid, phosphoric acid, anhydrous ammonia) are hazardous substances as defined by the bill, and certain fertilizer products may be listed as hazardous substances as well. . . . Under this exclusion, however, the "normal field application" of fertilizer is not a "release" as defined in the bill. . . . The term "normal field application" means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.

S. Rep. No. 96-848, at 46 (1980).

context. That context is not provided through argument but through evidence. As neither Poultry Defendants nor plaintiffs have offered any evidence in support of their motions for summary judgment on this issue, the Court denies the motions. (Dkt. # # 211 and 226).

V. COMMON LAW CLAIMS

A. Nuisance and Trespass

Tulsa proceeds under theories of nuisance and trespass against defendants. The primary difference between the two tort theories is in the interest protected; the same conduct can result in actionable invasion of both interests. Trespass protects the possessor's interest in exclusive possession of property as it involves "an actual physical invasion of the property of another." *Fairlawn Cemetery Assoc. v. First Presbyterian Church, 1972 OK 66, 496 P.2d 1185 at 1187 (Okla.1972)*; *Williamson v. Fowler Toyota, Inc., 1998 OK 14, 956 P.2d 858 aT 862 (Okla. 1998)* ("Trespass involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession."). Nuisance protects the possessor's interest in the use and enjoyment of the property. In general, "[a] nuisance, public **[**58]** or private, arises where a person uses his own property in such a manner as to cause injury to the property of another." *Fairlawn Cemetery Assoc. v. First Presbyterian Church, 496 P.2d 1185 aT 1187 (Okla.1972)*; *Roberts v. C.F. Adams & Son, 1947 OK 340, 199 Okla. 369, 184 P.2d 634, 637 (Okla. 1947)* ("Basically, the law with reference to private nuisances is a definition of the dividing line between the right of any owner to use his property as he so desires and the recognition of that right in another."); *Southeast Arkansas Landfill, Inc. v. State of Arkansas, 313 Ark. 669 at 673, 858 S.W.2d 665 (Ark. 1993)* ("Nuisance is defined as conduct by one landowner which unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property."); *Goforth v. Smith, 338 Ark. 65, 991 S.W.2d 579, 587 (Ark. 1999)* (same); *Miller v. Jasinski, 17 Ark. App. 131, 705 S.W.2d 442 at 443 (Ark. Ct. App. 1986)* (same). n16

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n16 In its motion for summary judgment, Decatur contends plaintiffs cannot establish a nuisance claim against it because the Water Supply is in a different state, fifteen miles from Decatur's WWTP, and therefore, not an "adjacent" or "nearby" property. The Arkansas cases cited by Decatur, however, do not require the affected property be adjacent and the Court declines to find a geographical limit to "nearby" property under Arkansas nuisance law which stops at state lines or mile markers. Certainly, if plaintiffs cannot prove the effluent from the WWTP is hydrologically connected to the Water Supply so as to contribute to the phosphorus loading of the lakes,

> plaintiffs cannot establish a nuisance claim against Decatur.

[59]**

A nuisance can be public, private or both. *Gus Blass Dry Goods Co. v. Reinman & Wolfort, 102 Ark. 287, 143* **[*1289]** *S.W. 1087, 1089 (Ark.1912)* ("Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, whereby it works a special injury to another in the use and enjoyment of his property will constitute a private nuisance. The same wrongful act and wrongful use of one's property may at once constitute both a public and private nuisance."); *City of Ft. Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724, 725 (Ark. 1922)* ("If injury results only to a few, on account of the peculiar circumstances, the nuisance is private, and the remedy is confined to those who suffer from the effects of the nuisance. If, on the other hand, the injury or annoyance is sufficient in extent to become common to all persons who may come within its influence, it is of a public nature."). "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131, 141 (Okla. Ct. App. 1995)*; **[**60]** *Okla. Stat. tit. 50, § 2. See also Okla. Stat. tit. 27A, § 2-6-105(A)* ("It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance."). Any other "unlawful interference" with another's use and enjoyment of property is a private nuisance. *Okla. Stat. tit. 50, § § 1 and 3*; *Briscoe v. Harper Oil Co., 1985 OK 43, 702 P.2d 33, 36 (Okla. 1985)*; *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc., 1996 OK CIV APP 92, 929 P.2d 288, 294 (Okla. Ct. App. 1996).*

Tulsa alleges the Poultry Defendants' growers' land application practices and Peterson/Decatur's wastewater effluent have discharged excess phosphorus to the Watershed, thereby resulting in a physical invasion of the lakes (trespass) and interference and impairment of the beneficial uses of the lakes, particularly their use as a municipal water supply (public and private nuisance). n17 Further, Tulsa alleges defendants knew or should have known their phosphorus loading was invading and interfering with plaintiffs' and **[**61]** the public's use of the lakes, and yet knowingly and intentionally continued their "disposal" practices.

n17 Tulsa contends it has also been "specially" injured in that it has incurred the cost to decontaminate the Water Supply.

1. Property Interest

Defendants Cargill and Decatur contend Tulsa does not have the requisite interest in property to bring nuisance or trespass claims against defendants, as the State of Oklahoma is the owner of Spavinaw Creek, and thereby the water that flows into Lakes Eucha and Spavinaw. They argue that Tulsa simply has a license for a quantity of water and not even a contractual right to warranty of water quality or clarity.

The Court finds no merit to this argument. First, a water right is considered real property. "Any wrongful and direct interference with the rights of another in the possession of water rights constitutes a trespass or tort. A wrongful interference with rights in respect to waters may also constitute a nuisance." 78 Am. Jur. 2d *Waters* § 10. Second, **[**62]** plaintiffs clearly have a possessory interest in the Water Supply sufficient to bring claims of nuisance and trespass. *Nichols v. Mid-Continent Pipe Line Co., 1996 OK 118, 933 P.2d 272, 276-78 (Okla. 1996)*. Stream water is "public water and is subject to appropriation for the benefit and welfare of the people of the state as provided **[*1290]** by law." *Messer-Bowers Co. v. Oklahoma ex. rel. Oklahoma Water Resources Board, 2000 OK 54, 8 P.3d 877, 879 (Okla. 2000)* (quoting *Okla. Stat. tit. 60, § 60*). The Oklahoma Water Resource Board (and its predecessor, the Oklahoma Planning and Resources Board, (collectively referred to "OWRB")) is entitled to appropriate water to municipalities or individuals for any "beneficial" use. Okla. Admin. Code § 785:20-1-6(2000). It is undisputed that the OWRB issued the City of Tulsa a Permit, Grant, License and Certificate to use and apply 205 cubic second feet of the waters of Spavinaw Creek for its present and future needs. Also, the Cherokee Tribe of Oklahoma granted an easement on March 11, 1964 which conveyed the following rights to Tulsa:

> (1) the right to use certain lands for the storage of water impounded by its dam on Spavinaw **[**63]** Creek (Eucha Dam) to the highest elevation (approximately 790 feet above sea level) to which water may be impounded by Eucha Dam;
>
> (2) full and exclusive use and control of said lands below elevation 790 feet above sea level, except as herein provided (exceptions include use by Cherokee Tribe);
>
> (3) use of Eucha Reservoir shall remain under the exclusive control and jurisdiction of the City of Tulsa.

Finally, as a municipality, Tulsa may bring a claim of public nuisance on behalf of the municipal users of the Water Supply under the common law and Oklahoma statutes. *Okla. Stat. tit. 50, § § 1-3*; *Okla. Stat. tit. 27A, § 2-6-105*; *Okla. Stat. tit. 11, § § 37-115* (A municipality may bring an action for pollution of the municipal water supply.); *N.C. Corff, 929 P.2d at 295* (finding alleged pollution of water a public nuisance under statutory and common law); *Ozark Poultry Products, Inc. v. Garman, 251 Ark. 389, 472 S.W.2d 714, 716 (Ark.1971)*; *Western Hide & Fur Co., 239 S.W. at 725*; Restatement (Second) of Torts *§ 821C(2)(b)* (1965) (In order to enjoin to abate a public nuisance, one must "have authority as a public official or **[**64]** public agency to represent the state or a political subdivision in the matter[.]"). It is in fact Tulsa's responsibility to insure the quality of drinking water for its citizens. *See* Safe Drinking Water Act, *42 U.S.C. § § 300f-300j.*

For these reasons, the Court finds Tulsa has the requisite property interest to bring claims of nuisance and trespass as alleged herein.

2. Violations of *Okla. Stat. tit. 27A, § 2-6-105* and *Okla. Stat. tit. 11, § 37-115* and Nuisance *Per Se*

Plaintiffs argue the Court should hold as a matter of law that poultry litter is a "pollutant" and that Poultry Defendants' activities through their growers have caused poultry manure to enter the waters of Oklahoma and the Water Supply in violation of *Okla. Stat. tit. 27A, § 2-6-105* n18 and *Okla. Stat. tit. 11, § 37-115*, n19 **[*1291]** thus creating a nuisance *per se*. Plaintiffs reason as follows: (1) Poultry Defendants' growers have placed poultry litter on land in the Watershed; (2) the poultry litter has found its way to the Water Supply; (3) animal manure is a "pollutant" under the CWA, *33 U.S.C. § 1362(6)*, which includes "dredged spoil, solid waste, incinerator **[**65]** residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water"; *see also Okla. Stat. tit. 27A, § 2-6-101(8)* (identical definition under *Oklahoma's Water Quality Act* except the last phrase states "agribusiness waste discharged into waters of the state"); n20 (4) it is a violation of *Okla. Stat. tit. 27A, § 2-6-105* and *Okla. Stat. tit. 11, § 37-115 to* pollute or cause pollution of state and municipal waters; and (5) such violations constitute nuisance *per se*.

n18 As noted above, *section 2-6-105(A)* provides:

> It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.

n19 *Section 37-115* states:

> No person, firm,

> partnership, or corporation, or any of the partners, officers, managers, or employees thereof, shall pollute or permit the pollution of the water supply of a municipality, or any stream, pond, spring, lake, or other water reservoir or groundwater aquifer, which is used or which is being held for use as a water supply by a municipality. A municipality may bring an action in the district court to enjoin any activity that will cause pollution of the water supply of a municipality whether or not such activity is regulated, licensed, or inspected. For the purposes of this section, the term pollution means contamination or other alteration of the physical, chemical, or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous, or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to the health, safety, or welfare of the general public, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, or fish or other aquatic life.

[66]**

n20 "Pollution," within the meaning of the CWA, is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," *33 U.S.C. § 1362 (2003).*

The Court rejects this argument. Plaintiffs seek to have the Court find *ab initio* what they must prove at trial. Plaintiffs' claim based on the pollution of waters from the land application of litter is a claim of nuisance *per accidens*, or in fact, not *per se*. It is plaintiffs' burden to prove the land application of litter has "become a nuisance by reason of the circumstances, or location or surroundings," including by phosphorus in the litter making its way to and "polluting" the Water Supply. *Town of Lonoke v. Chicago, R.I. & P.R. Co., 92 Ark. 546, 123 S.W. 395, 398 (Ark. 1909)*; *British-Am. Oil Producing Co. v. McClain, 1942 OK 89, 191 Okla. 40, 126 P.2d 530, 532-33 (Okla. 1942)* ("While a particular use may not be a nuisance *per se* it may grow into a nuisance *per accidens.*"); *Western Hide & Fur Co., 239 S.W. at 726*; **[**67]** *Gus Blass Dry Goods Co., 143 S.W. at 1089.*

Cargill, in fact, argues it is entitled to the opposite presumption - that the land application of poultry litter is reasonable and does not constitute a nuisance, citing *Okla. Stat. tit. 50, § 1.1(B)*. *Section 1.1(B)* states:

> Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect [sic] on the public health and safety.

Cargill contends this agriculture exception to nuisance applies because the land application of litter is "consistent with good agricultural practices" and has not had a "substantial adverse affect [sic] on the public health and safety."

While the Court agrees the latter is undisputed in the record, the former is not. Further, Poultry Defendants have not shown the land application of poultry litter by its growers was "established prior to the use of the lakes as a municipal water supply." Therefore, the Court cannot find the exception applies as a matter of law.

The **[**68]** Court accordingly denies plaintiffs' motion for summary judgment that the **[*1292]** land application of poultry litter is a nuisance *per se*, (Dkt. # 225) and Cargill's motion based on the agricultural exception. (Dkt. # 238).

3. Liability of Poultry Defendants

Plaintiffs' Oklahoma common law claims against the Poultry Defendants (with the exception of Peterson's alleged liability under Arkansas law for effluent from the Decatur WWTP) are based upon Poultry Defendants' vicarious liability as principals or employers of the poultry growers. Poultry Defendants move for summary judgment on liability arguing (1) the Packers and Stockyards Act ("PSA"), *7 U.S.C. § 181 et seq.*, and the Agriculture Fair Practices Act ("AFPA"), *7 U.S.C. § 2301 et seq.*, which implicitly preempt Oklahoma law, define the relationship as one of independent contract, and (2) even if there is no preemption, the relationship is one of bailment and as bailors the Poultry Defendants cannot be held liable for the acts or omissions of their bailees. (Dkt. # 211) George's separately moves for summary judgment that the undisputed facts establish the relationship between **[**69]** it and its growers as one of independent contract and, therefore, it cannot be held liable for their acts or omissions. (Dkt. # 230).

Poultry Defendants contend that the PSA and AFPA legislatively define the relationship between the Poultry Defendants and their poultry growers as one of principal/independent contractor. Under the PSA, a "poultry growing arrangement" is

> any growout contract . . . . or other arrangement under which a

> poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter.

7 U.S.C. § 182(9) (emphasis added). "Poultry grower" under the PSA is

> any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry.

7 U.S.C. § 182(8). Likewise, a "handler" under the AFPA means

> any person engaged in the business . . . of (1) acquiring agricultural products from producers . . . for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from **[**70]** producers . . .; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers . . . n21

7 U.S.C. § 2302(a) (emphasis added). Poultry Defendants argue that these provisions show the PSA and AFPA extensively regulate all aspects of the relationship between contract growers and Poultry Defendants; therefore, any common law analysis of the relationship is impliedly preempted. Further, they contend that preemption is implied because any state common law analysis would stand as an obstacle to congressional objectives to promote vertical integration farming, to support the independent contract grower, and to modernize agriculture. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1985).*

> n21 Poultry Defendants argue that they are "handlers" and the poultry growers are "producers" under the AFPA. *See 7 U.S.C. § 2302(a), (b), and (e).*

[71]**

The Court does not find implied preemption of the legal definition of the relationship between the Poultry Defendants and their growers under these Acts. Neither Act evinces Congress' intent to completely **[*1293]** occupy the field of agricultural production and marketing or to foreclose the application of state law. *Adams v. Greeson, 300 F.2d 555, 557-58 (10th Cir. 1962)* (The PSA does not alter in whole or part the rights of parties under state law in a transaction where the owner delivers livestock to a purchaser who pays with a worthless check.); *Mich. Canners & Freezers Ass'n v. Agric. Mktg & Bargaining Bd., 467 U.S. 461, 469, 81 L. Ed. 2d 399, 104 S. Ct. 2518 (1984)*

("The AFPA contains no preemptive language; nor does it reflect a congressional intention to occupy the entire field of agricultural-product marketing."). Neither does Oklahoma common law stand as an obstacle to the objectives of the PSA or AFPA. The purpose of the PSA is to address the problem of "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford v. Wallace, 258 U.S. 495, 514-15, 66 L. Ed. 735, 42 S. Ct. 397 (1922).* **[**72]** The purpose of the AFPA is to insure that individual farmers "are free to join together voluntarily in cooperative organizations." *7 U.S.C. § 2301.* Interpreting the relationship between Poultry Defendants and their poultry growers under Oklahoma law does not frustrate either purpose. *Sig Ellingson & Co. v. DeVries, 199 F.2d 677, 679 (8th Cir. 1952)* (The PSA does not supersede state law in determining who is owner of cattle or imposing liability on market agency for selling cattle for principal who is not true owner.); *Philson v. Cold Creek Farms, Inc., 947 F. Supp. 197, 203 (E.D.N.C. 1996)* (state law negligence claim not prohibited by *PSA); Black Hills Packing Co. v. S.D. Stockgrowers Ass'n, 397 F. Supp. 622, 630 (D.S.D. 1975)* (PSA does not preempt state inspection laws). In addition, the AFPA expressly provides it "shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction." *7 U.S.C. § 2305(d).* Oklahoma common law, therefore, applies in determining the relationship between the Poultry Defendants and their growers.

Under Oklahoma **[**73]** law, the following factors are considered to determine whether an employer/employee relationship exists:

> (a) the nature of the contract between the parties, whether written or oral; (b) the degree of control which, by the agreement, the employer may exercise on the details of the work or the independence enjoyed by the contractor or agent; (c) whether or not the one employed is engaged in a distinct occupation or business and whether he carries on such occupation or business for others; (d) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (e) the skill required in the particular occupation; (f) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (g) the length of time for which the person is employed; (h) the method of payment, whether by the time or by the job; (i) whether or not the work is a part of the regular business of the employer;

> (j) whether or not the parties believe they are creating the relationship of master and servant; and (k) the right of either to terminate the relationship **[**74]** without liability.

Page v. Hardy, 1958 OK 283, 334 P.2d 782, 784-85 (Okla. 1959); *Duncan v. Powers Imports, 1994 OK 126, 884 P.2d 854, 856 n. 1 (Okla. 1994)*; *Coleman v. J.C. Penney Co., 1993 OK 21, 848 P.2d 1158, 1160 (Okla. 1993)*. This determination turns on the facts of a particular case. *Bouziden v. Alfalfa Electric. Coop., Inc., 2000 OK 50, 16 P.3d 450, 459 (Okla. 2000)*. A decisive factor is the control exerted by the employer over the work. *Id.*

[*1294] The Court finds that there are fact questions regarding the nature of the relationship between the Poultry Defendants and their poultry growers. Defendant George's contends that the following facts establish that its growers are independent contractors: (1) the contract expressly holds George's harmless for the grower's operation as an "independent contractor" and states the grower and its employees or agents "will not be considered to be employees of [George's] for any purpose whatsoever"; (2) the grower exercises ultimate control over his/her poultry operation; (3) growers can contract with other Poultry Defendants or other agricultural operations; (4) growers own their own farms and poultry **[**75]** houses; (5) each grower operates on a flock-to-flock or other specific term basis; (6) each party has the right to terminate the contract at the end of the term or occurrence of specific conditions; (7) growers are paid by the job or flock, not by salary; (8) Poultry Defendants' primary business is meat processing to supply retail customers but the growers' business is to raise the poultry to provide the meat to be processed and sold. n22 Plaintiffs, however, argue (1) George's determines the number and breed of chicks to be delivered and when they are delivered to the growers; (2) George's provides and determines the feed and medication for the birds; (3) growers must follow the recommended management practices outlined by George's in the raising and feeding of the birds set forth in the Growers Handbook; (4) George's maintains sole ownership of the poultry and supplies furnished under the contract; and (5) the testimony of former growers of Tyson, Peterson and Simmons is that they did not have any independence in determining how to raise the birds. There are clearly genuine issues of material fact which preclude summary judgment on the nature of the relationship between George's **[**76]** and its growers. (Dkt. # 229).

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n22 The Court notes that George's did not refer to the record with particularity in support of its statement of undisputed facts, as required by Local Rule 56.1. Reference to the record in the argument does not meet this requirement.

Further, Poultry Defendants cannot escape this factual dispute in characterizing the relationship between the Poultry Defendants and the growers as one of bailor/bailee. The inquiry concerning the extent of control remains. *See Oklahoma Publishing Co. v. Autry, 1969 OK 197, 463 P.2d 334, 337 (Okla. 1969)* ("Bailor cannot be held responsible to a third person for injuries resulting from his bailee's negligent use of the bailed property, in the absence of any control exercised by the bailor at the time of the negligence."); *Broaddus v. Commer. Nat'l Bank of Muskogee, 113 Okla. 10, 237 P. 583 at 584, 1925 OK 527 (Okla. 1925).*

Plaintiffs argue that the issue of the Poultry Defendants' degree of control over their growers need not go to the jury **[**77]** because the Poultry Defendants are nevertheless liable as a matter of law for any nuisance or trespass caused by the known or foreseeable contract activities of their growers. In support, plaintiffs cite the exception set forth in Restatement (Second) Torts *§ 427B. Section 427B*, titled "Work Likely To Involve Trespass Or Nuisance" (the "exception") states:

> One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

Comment b to § 427B further explains:

> This exception applies to work which involves a trespass on the land of another, or either a public or a private nuisance. **[*1295]** It applies in particular where the contractor is directed or authorized by the employer to commit such a trespass, or to create such a nuisance, and where the trespass or nuisance is a necessary result of doing the work, as where the construction of a dam will necessarily flood other land. It is not, however, necessary to the application of the rule that the **[**78]** trespass or nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result.

See also Weinman v. De Palma, 232 U.S. 571, 576, 58 L. Ed. 733, 34 S. Ct. 370 (1914) ("The 'independent contractor' doctrine [does not] apply where the work that the contractor is to do of itself amounts to a nuisance or necessarily operates to injure or destroy the property of plaintiff."); *Tankersley v.*

Webster, 1925 OK 520, 116 Okla. 208, 243 P. 745, 747 (Okla. 1925) (recognizing the exception "'that where the performance of [a] contract, in the ordinary mode of doing the work necessarily or naturally results in producing the . . . nuisance which caused the injury, then the employer is subject to the same liability to the injured party as the contractor'"); *Shannon v. Mo. Valley Limestone Co., 255 Iowa 528, 122 N.W.2d 278 at 280-81 (Iowa 1963)* ("This determination assists the limestone company very little. The general rule that the employer or contractee **[**79]** is not liable for the torts of the independent contractor is subject to exceptions. One of the exceptions is where the work contracted to be done is likely to create a nuisance."); *Amoco Pipeline Co. v. Herman Drainage Sys., Inc., 212 F. Supp. 2d 710, 722-23 (W.D. Mich. 2002)* (applying the exception to trespass claim); *McQuilken v. A&R Dev. Corp. 576 F. Supp. 1023, 1033 (E.D. Pa. 1983)* ("Under *§ 427B*, ownership of the property upon which the nuisance is created is not determinative, nor is the absence of control over the work performed. An employer or contractor is held liable for 'farming out' work which he knows, or has reason to know, will create a nuisance.").

In *Bleeda v. Hickman-Williams, 44 Mich. App. 29, 205 N.W.2d 85 (Mich. Ct. App. 1973)*, defendant Hickman-Williams & Co. ("Hickman") delivered coke to a plant which screened and sized the coke and then shipped the coke to Hickman's customers. A landowner adjoining the coke plant brought a nuisance action against Hickman due to the "obnoxious dust and odors" that emanated from the plant. *205 N.W. 2d at 86-87.* Hickman contended that the plant was an independent contractor **[**80]** and bailee and, as a matter of law, Hickman was not liable for any nuisance caused by the plant. Hickman was the plant's only customer and at all times retained title to the coke. The coke was delivered to the plant on trucks belonging either to third parties or to the plant. The trial court entered summary judgment in Hickman's favor on liability. *Id. at 87.*

In reversing the trial court, the appellate court relied on the *§ 427B* exception. *205 N.W. 2d at 89.* The court reasoned that Hickman knew how the plant conducted its operations; the methods used were the methods in contemplation of the parties at the time of contracting; when Hickman delivered the coke, it knew it would be sized in the manner used, and knew "for some time the method customarily used and the extent of the damage, if any, caused the plaintiffs." *Id. at 90.*

According to the plaintiffs, the undisputed facts establish that the Poultry Defendants knew that their growers, in the ordinary course of their work for Poultry Defendants, spread poultry litter on the land in the Watershed, and knew or should have known no later than 1996 that their growers' land application of litter **[**81]** **[*1296]** was a primary source of the excess phosphorus causing the degradation of plaintiffs' Water Supply. Once the Poultry Defendants had such notice, they had a duty to suppress or abate the nuisance, which they have not done. *See Shannon v. Mo. Valley Limestone Co., 255 Iowa 528, 122 N.W.2d 278, 280 (Iowa 1963)*. Therefore, the Poultry Defendants are liable for any trespass or nuisance created by their growers because they were aware or should have been aware that in the ordinary course of doing the contract work a trespass or nuisance was likely to result. *Bleeda, 205 N.W.2d at 89* ("An employer or contractor who farms out work and who knows or has reason to know that it will create a nuisance is subject to liability for the harm caused others by the nuisance.").

Poultry Defendants agree that the exception states that where the work actually performed is a nuisance or injures or destroys the property of another, the principal can be liable. n23 However, the work actually performed under the contract is "growing chickens" which does not inherently result in any nuisance; "it is not until after the contract growers have completed their work (i.e., growing **[**82]** chickens) that the alleged nuisance could potentially arise." Poultry Defendants' Response at 18 (Dkt. # 255). The growers exercise exclusive ownership and control of the litter and Poultry Defendants have a right to assume the growers will make use of litter in a manner consistent with applicable law. Further, Poultry Defendants assert that they "were not aware until the 1990s that phosphorus presented potential problems to the Watershed," and at that point, took "tangible, reasonable steps" to educate growers about litter management issues to prevent and abate phosphorus concerns within the limits allowed by their contracts with the growers. Poultry Defendants' Response at 22 (Dkt. # 255).

> n23 Poultry Defendants move to strike plaintiffs' motion based on the exception, as plaintiffs added this new theory of liability after discovery was closed. They contend that additional discovery is necessary "regarding the scientific aspects of the argument and the validity inquiries into the remote authorities relied upon by the plaintiffs regarding their argument." The Court denies the motion to strike (Dkt. # 255). The Court is at a loss as to what "scientific aspects" and "validity inquiries" this theory creates which further discovery would have informed.

[83]**

The Court concludes that the exception applies in this case. Poultry waste "necessarily follows" from the "growing" of poultry. *See Bleeda, 205 N.W.2d at 89.* Although Poultry Defendants cite other sources of phosphorus in the Watershed, they admit in their response brief that they were aware in the 1990s that "phosphorus presented potential problems to the Watershed" and, therefore, attempted to address the problem by educating their growers regarding better litter management. Given these admissions, the Court finds Poultry Defendants had "reason to recognize that, in the ordinary course of [the growers] doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result." n24 Restatement (Second) Torts *§ 427B, cmt. b* (1965); *Tankersley, 243 P. at 747.* As the Court concludes that the *§ 427B* exception applies herein, the factual questions regarding the Poultry Defendants' degree of control over their growers need not be addressed at the jury trial. n25 Accordingly, **[*1297]** the Court grants plaintiffs' motion for partial summary judgment on the issue of the Poultry Defendants' vicarious liability for any trespass or nuisance created **[**84]** by their growers because they were aware that in the ordinary course of doing the contract work, a trespass or nuisance was likely to result. (Dkt. # 225).

> n24 The Court emphasizes it is not finding that a trespass or nuisance occurred from the growers' land application of litter. Those are questions for the jury to decide.n25 The degree of Poultry Defendants' control, however, remains a factor for the Court to determine in assessing the Poultry Defendants' liability as "arrangers" under CERCLA.

4. Causation and Indivisible Harm

Poultry Defendants seek summary judgment that plaintiffs cannot prove causation as they cannot quantify the impact on the Watershed caused by the land application of poultry litter by each Poultry Defendant. (Dkt. # # 211, 216, 232, 239). Plaintiffs concede that they cannot apportion the harm or the damages among the defendants. However, they contend that where intentional tortious acts of several defendants combine to cause an indivisible harm as here, they are not **[**85]** required to prove the particular harm or damages caused by a particular defendant, and defendants are jointly and severally liable for the damages from that harm. n26

> n26 Decatur also moves for summary judgment that plaintiffs cannot establish that they have suffered harm that was certain, substantial and not speculative, as the Water Supply is in full compliance with the *Safe Drinking Water Act and* does not present any health hazards. (Dkt. # 240). The Court denies the motion. To succeed on their common law claims, plaintiffs are not required to show defendants created a health hazard. Plaintiffs assert that defendants' actions affected the quality of the Water Supply, which required plaintiffs to incur costs in assessment and treatment of the Water Supply.

The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma and Arkansas law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple **[**86]** tortfeasors and the separate and independent acts of codefendants "concurred, commingled and combined" to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury. *Boyles v. Okla. Nat. Gas Co., 1980 OK 163, 619 P.2d 613, 617 (Okla. 1980)* (negligence); *Bode v. Clark Equip. Co., 1986 OK 21, 719 P.2d 824, 827 (Okla. 1986)* (comparative negligence); *McGraw v. Weeks, 326 Ark. 285, 930 S.W.2d 365, 367-68 (Ark. 1996)* (negligence).

In *Boyles*, the Oklahoma Supreme Court affirmed that comparative negligence principles do not apply when a blameless plaintiff seeks recovery from multiple tortfeasors whose negligence allegedly "concurred, commingled and combined" to produce the harm. *619 P.2d at 616*. In *Boyles*, an injured passerby sued defendants to recover damages for injuries he sustained from a gas explosion in a vacant building. The defendants appealed the trial court's refusal to instruct the jury to assess the percentage of negligence of each defendant. In affirming the trial court, the Court reasoned:

> In **[**87]** the instant case there was but a single injury. Implicit in the jury's verdict is its finding that the separate and independent acts of negligence on the part of the codefendants concurred and combined to produce the harmful result for which damages were sought. Even though concert among the tortfeasors was lacking and the act of one codefendant alone may not have brought about the result, each is at common law responsible for the entire damage.

Id. at 617 (footnote omitted).

This reasoning has been repeatedly applied by Oklahoma courts in pollution cases. In *Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131, 149-50 (Okla. Ct. App. 1995)*, the Oklahoma Court of Civil Appeals held that defendants were jointly **[*1298]** and severally liable for saltwater contamination of the aquifer which constituted the municipal water supply.

> The single, indivisible injury at issue in this case is the contamination of the town of Cyril's water supply by saltwater used in oil and gas operations. The general rule is that where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts **[**88]** will not attempt to apportion the damage, especially where it is impracticable to do so, but will hold each joint tort-feasor liable

> for the entire result. To make tortfeasors jointly liable, there must be a single injury, there must be community in the wrongdoing and the injury must be in some way due to their joint work. It is not necessary that they be acting together or in concert if their concurring wrongful acts occasion the injury.

Id. at 149-50 (citations omitted); *see also Harper-Turner Oil Co. v. Bridge, 1957 OK 124, 311 P.2d 947, 950-51 (Okla. 1957)* (finding circumstantial evidence of contamination of water well by oil well located 233 feet from the water well sufficient to submit to jury on causation). n27

[89]**

In *Prairie Oil & Gas Co. v. Laskey, 1935 OK 608, 173 Okla. 48, 46 P.2d 484 (Okla.1935)*, the plaintiff landowner sued two oil and gas companies whose leases ran "wild" at separate times about a month apart for damage to a stream and trees on her land. *46 P. 2d at 485-86.* Rejecting the defendants' argument that they should not be held jointly liable because the leases ran wild at different times on different tracts and there was no common design or concert of action, the Oklahoma Supreme Court found the following evidence sufficient:

> The evidence shows that oil escaped from the Sudik lease operated by the defendant Indian Territory Illuminating Oil Company all over the area and drained into Crutcho creek, and that oil escaped from the Sigmon lease operated by the Prairie Oil & Gas Company all over the area and drained into Crutcho creek, which creek ran through plaintiff's farm, and said creek on plaintiff's farm became polluted with oil, and a number of trees along said creek on plaintiff's farm died by reason thereof. The separate acts of said defendants in permitting oil to escape from their leases combined to cause the damage to Crutcho creek that

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> n27 Poultry Defendants argue that this case is distinguishable from *Union Texas* because poultry litter is only one of many sources of phosphorus in the Watershed, and the offending litter application occurs on land distant from the Water Supply. However, in *Union Texas*, the ALJ made the finding that the "weight of the evidence showed there was no way to determine what amount of contamination came from any particular source." *Id. at 136.* The ALJ cited "three primary sources of contamination" - land spreading of produced saltwater, operation of unlined saltwater evaporative pits, and oil companies' excess injection rates.
>
> *Id.*

> ran through plaintiff's **[**90]** farm, and combined to cause the damage to the trees on plaintiff's land, and each is responsible for the entire damage.

Id. at 485-86 (citation omitted). In so finding, the court cited the rule of concurrent negligence:

> If concurrent negligence of two or more persons combined together results in an injury to a third person, they are jointly and severally liable and the injured person may recover from either or all; the concurring negligence of one is no excuse or defense to another; each is liable for the whole; even though another was equally culpable, or contributed in a greater degree to the injury; no consideration is to be given to the comparative degree of negligence or culpability, or the degree of care owing; and further **[*1299]** inquiry as to proximate cause is not pertinent.

Id. at 486.

In *Northup v. Eakes, 1918 OK 652, 72 Okla. 66, 178 P. 266 (Okla. 1919)*, the Oklahoma Supreme Court held that defendant owners of separate oil and gas leases were jointly and severally liable for the loss of plaintiff's barn which ignited from crude oil which flowed into the creek near the barn. *Id. at 269.* Citing the general rule that when separate acts of negligence **[**91]** combine to produce a single injury, each tortfeasor is responsible for the entire result and no concert of action need be shown, the Court held:

> applying this principle to the facts disclosed by the record, it is clear that while the lessees holding separate leases acted independent of each other, yet their several acts in permitting the oil to flow into the stream combined to produce but a single injury. In these circumstances each is responsible for the entire result, even though his act or neglect alone might not have caused it.

Id. at 268.

This rule is also recognized under Arkansas law. In *McGraw v. Weeks, 326 Ark. 285, 930 S.W.2d 365 (Ark. 1996)*, the Arkansas Supreme Court affirmed the trial court's finding that the damage to plaintiff's cotton crop from pesticides which drifted from neighboring properties to the plaintiff's land was impossible to apportion and that defendants were jointly and severally liable. (The jury had found one defendant 75% and another 25% at fault for the harm). *930 S.W. 2d at 368.* The trial court found that "even though each tortfeasor's act of negligence might not have caused all of the damage, they combined **[**92]** to produce, for the most part, a single injury, and each was responsible for the entire result." *326 Ark. at 288.* The Arkansas Supreme Court rejected defendant's arguments on appeal that the harm was divisible and plaintiff had to show tortfeasors were acting in concert for joint and several liability to attach. The Court affirmed that the harm was indivisible: "the damage to [plaintiff's] cotton crop was the result of the acts of both [tortfeasors] in negligently applying [pesticide] and the trial court ruled that it was impossible to determine in what proportion each contributed to the damages." *930 S.W. 2d at 368.* The Court also found that "in this State, joint and several liability is measured by impact, and where there is a single injury, it does not matter whether the individual acts alone would not have caused the entire result." *Id. at 367.*

As in the instant case, the above cases involve separate acts of multiple defendants allegedly combining to cause an indivisible harm. In none of the cases is the plaintiff required to prove the portion of the harm that was caused by each defendant.

How damages are apportioned, on the other hand, **[**93]** depends on the basis of each defendant's liability under Oklahoma law. If the tort is an intentional tort or simple negligence, each defendant who contributed to the indivisible harm is jointly and severally liable to plaintiff for all the damages resulting from that harm. *Boyles, 619 P.2d at 617*; *Nat'l Union Fire Ins. Co v. A.A.R. Western Skyways, Inc., 1989 OK 157, 784 P.2d 52, 55-56 (Okla.1989)* (other than in comparative negligence cases, "joint and several liability with the right at common law of the plaintiff to recover all of his damages from any tortfeasor regardless of the degree of negligence that party contributed to the plaintiff's damages, continues to be the law."); *see also Gutowski v. City of New Britain, 165 Conn. 50, 327 A.2d 552 (Conn. 1973)* (finding two officers jointly and severally liable for plaintiffs' injuries from intentional assault and battery). If, however, the tort is one of comparative negligence, each defendant's liability is several, *i.e.*, each defendant is liable for the portion of plaintiff's **[*1300]** damages that reflect the percentage of that defendant's comparative fault. *Bode, 719 P.2d at 827-28* **[**94]** (finding in comparative negligence action, plaintiff who was found 9% liable could recover under comparative negligence statute, *Okla. Stat. tit. 23, § 13*, from defendant United States who was 1% liable because the combined negligence of tortfeasors United States and non-party employer was 91%). n28 Proof of causation, however, remains the same.

n28 As is apparent from *Bode*, plaintiff was able to recover in a comparative negligence case from a defendant whose fault was less than that of plaintiff's because the combined negligence of defendants exceeded that of plaintiff's. Unlike joint and several liability cases, plaintiff's recovery from the less culpable defendant, however, was limited to the defendant's proportion of fault (in this case, 1% of plaintiffs damages). In answering yes to the certified question - "Whether a party plaintiff-tortfeasor who has been found to be nine percent (9%) negligent may recover against a party defendant found to have been one percent (1%) negligent" - the Oklahoma Supreme Court explained:

> The cornerstone of comparative negligence is founded on attaching liability in direct proportion to the fault of *each entity* whose negligence caused the damage . . . . The law is clear in Oklahoma that if a defendant's actions contributed to cause the injury, the defendant is liable even though his/her act or negligence *alone* might not have been a sufficient cause.

Id. at 827 (citations omitted) (emphasis added).

[95]**

The Court recognizes that the legal lines between fault, causation, and harm are far from bright. However, what Poultry Defendants appear to be arguing is that plaintiffs have to show "factual causation." *Comment b to the Restatement (Third) of Torts, Apportionment of Liability § 11*, is helpful in explaining the distinction between apportionment of fault in several liability instances, such as comparative negligence cases, and factual causation:

> Historically, several liability was employed in situations where the plaintiffs injury was divisible according to the causal contributions of multiple defendants. This use of several liability imposed a burden of proof on plaintiff to demonstrate the portion of the injury caused by each defendant. Thus, factual causation was the basis for determining the several-liability portion of the plaintiffs injuries for which each defendant was liable. Nevertheless, in cases in which proof was unavailable or difficult to obtain, many courts adopted joint and several liability to relieve the plaintiff of the difficulties of proof.

Restatement (Third) of Torts, Apportionment of Liability § 11, cmt. b (2000). Under current comparative **[**96]** negligence principles, however, damages are not apportioned by factual causation but by fault: "'several liability' is widely employed and understood today to mean that a defendant is liable only for the proportionate share of plaintiffs indivisible injury determined by multiplying the comparative responsibility assigned to any defendant by the amount of plaintiff's damages." *Restatement (Third) of Torts, Apportionment of Liability § 11, Reporters' Note to cmt. a (2000).*

In this case, plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant. Rather, plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs. Based on the record before the Court on summary judgment, causation is a question of fact for the jury. Accordingly, the Court denies defendants' motions for partial summary judgment based on causation. n29 (Dkt. # # 211, 232, 239, 216, and 240).

> n29 Separate defendant George's also argues that plaintiffs cannot establish a causal link between land application of poultry litter and the alleged taste and odor episodes for which plaintiffs seek recovery. (Dkt. # 229). George's, however, failed to set forth any statements of undisputed fact or evidence to support this argument as required by Local Rule 56.1. In any case, there are genuine issues of material fact which preclude summary judgment on this basis.

[97] [*1301]**

5. Plaintiffs' "Contributory Negligence"

Poultry Defendants seek partial summary judgment that they cannot be held jointly and severally liable for plaintiffs' negligence, negligence *per se* and nuisance claims because plaintiffs have also contributed to the phosphorus loading in the lakes. (Dkt. # 211). Since the filing of this motion, the Court permitted plaintiffs to dismiss their negligence-based claims. (Dkt. # 301). Plaintiffs' remaining common law claims are based on intentional tort theories of trespass and nuisance. As the Court noted above, liability of each defendant for intentional torts is joint and several. Poultry Defendants argue that they are nonetheless entitled to a contributory negligence defense as plaintiffs' nuisance claims are inherently based on negligence, citing Restatement (Second) of Torts *§ 840B(1)* ("When a nuisance results from negligent conduct of the defendant, the contributory negligence of the plaintiff is a defense to the same extent as in other actions founded on negligence.").

First, the Court finds plaintiffs have stated a claim of nuisance which is intentional in nature. Restatement (Second) of Torts *§ 825* defines "Intentional Invasion" **[**98]** as follows:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or

> (b) knows that it is resulting or is substantially certain to result from his conduct.

Plaintiffs in essence are asserting that defendants knew an "invasion" of phosphorus in plaintiffs' and the public's use and enjoyment of the Water Supply was substantially certain to result from Poultry Defendants' growers' land application of litter and Decatur's WWTP effluent discharge, yet allowed this conduct to continue unabated. Whether or not the first "invasion" is intentional, "when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional." Restatement (Second) of Torts *§ 825, cmt. d* (1965); *Robinson v. City of Ashdown, 301 Ark. 226, 783 S.W.2d 53, 56 (Ark. 1990)* ("when one knows that an invasion of another's interest in the use and enjoyment of land is substantially certain to result from one's conduct, the invasion is intentional."); *Cities Service Oil Co. v. Merritt, 1958 OK 185, 332 P.2d 677, 685 (Okla. 1958)* **[**99]** (Defendants' salt water pollution of creek which in turn polluted landowner's well constituted a continuing nuisance for which defendants were jointly and severally liable); *Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 881-82 (Mo. 1985)* (finding a continuing intentional nuisance because "the jury had sufficient evidence to conclude defendant continued to operate the landfill after it knew of the leachate problem"). Similarly, plaintiffs are alleging a continuing intentional trespass claim. n30

[*1302] Second, although Poultry **[**100]** Defendants correctly recite the rule, under *§ 840B(1)* of Restatement (Second)of Torts, that contributory (comparative) negligence is a defense to a nuisance claim based on negligence, *§ 840B(2)* applies here: "When the harm is intentional, or the result of recklessness, contributory negligence is not a defense." *See also Whitlock v. Smith, 297 Ark. 399, 762 S.W.2d 782, 783 (Ark. 1989)* (finding trial court correctly refused to give instruction on comparative fault as defense to battery); *Graham v. Keuchel, 1993 OK 6, 847 P.2d 342, 363 (Okla. 1993)* ("jury must be instructed that while ordinary negligence may be used as a defense against gross negligence, it may not be considered as a defense against any form of conduct found to be willful and wanton or intentional.");

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n30 Decatur correctly recognizes that a trespass can result simply from the intent to voluntarily commit an act which invades the property of another without any intent to harm. Prosser and Keeton, *The Law of Torts* § 13 (1984) ("The intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred."). However, herein, plaintiffs are alleging knowledge of and intent to harm.

Oklahoma Uniform Jury Instruction (Civil), Instruction No. 9.17A.

"Tort law generally reflects two variables: the nature of the defendant's conduct and the nature of the plaintiff's injury." *Restatement (Third) of Torts, Apportionment of Liability § 1, cmt. a (2000)*. The causation analysis in subsection (4) above turns on the latter, while the applicability of contributory negligence is fashioned **[**101]** by the former. Simply stated, "the common law's rationale for refusing to apply contributory negligence to intentional torts was that conduct that gives rise to intentional tort liability is different in kind from plaintiff's contributory negligence." William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?, 37 Okla. L. Rev. 641, 647 (1984)*. In his article, McNichols discusses contributory negligence in relation to nuisance:

> Some early cases indicated that contributory negligence is never a defense in nuisance. The modern view is that contributory negligence will be a defense if the underlying basis of nuisance is negligence. The position of the *Restatement (Second) of Torts* is that contributory negligence is a defense to a nuisance based on negligence, but not to an intentional nuisance or one based on strict liability.

Id. at 669. Although McNichols argues comparative negligence should be an available defense in certain "intentional" torts, *e.g.*, in an intentional nuisance "where defendants intentionally invade plaintiff's legally protected interests but *do not intend the tangible harm that* **[**102]** *in fact results*," he acknowledges that contributory negligence is not a defense to an intentional tort under the common law. *Id. at 672*.

As plaintiffs have dismissed their negligence-based claims, plaintiffs have deprived defendants of a contributory or comparative negligence defense. However, while this precludes any apportionment of damages to plaintiffs should they succeed in proving their intentional continuing nuisance and trespass claims, plaintiffs do risk forfeiting any recovery for failing to prove the necessary intent. In addition, the Court emphasizes that the loss of this defense (and the allocation of plaintiffs' fault) does not preclude evidence of plaintiffs' contribution to the phosphorus loading of the lakes, as such is relevant to defendants' proof of want of causation.

Based on the above, the Court denies Poultry Defendants' motion for summary judgment on contributory negligence. (Dkt. # 211).

6. Damages for Inconvenience and Annoyance

Poultry Defendants move for summary judgment that plaintiffs cannot recover damages for annoyance and inconvenience in their nuisance claims as these damages arise from injuries to the person, not the property,

[103]** citing *Truelock v. City of Del City, 1998 OK 64, 967 P.2d 1183, 1187 (Okla. 1998)*. They contend that entitlement to such damages requires a plaintiff to prove it has **[*1303]** in fact suffered annoyance or inconvenience, which an inanimate entity, such as a municipal corporation, cannot do. Such damages, therefore, are recoverable only by natural persons.

Annoyance and inconvenience caused by maintenance of a nuisance is a separate and distinct element of damages from those arising from injury to property. *Thompson v. Andover Oil Co., 1984 OK CIV APP 51, 691 P.2d 77, 83 (Okla. Ct. App.1984)*; *Oklahoma City v. Eylar, 1936 OK 614, 177 Okla. 616, 61 P.2d 649, 650 (Okla. 1936)*. Inconvenience and annoyance are injuries to the person and not to the property. *See Truelock, 967 P.2d at 1187* (quoting *Okla. City v. Tytenicz, 171 Okla. 519, 43 P.2d 747 at 748-49, 1935 OK 433 (Okla. 1935))*. However, it does not necessarily follow that only natural persons can recover damages for such injuries.

The Arkansas Supreme Court in *Gus Blass Dry Goods Co. v. Reinman & Wolfort, 102 Ark. 287, 143 S.W. 1087 (Ark. 1912)*, specifically held that a corporation may **[**104]** be entitled to such damages:

> a corporation may be entitled to the relief granted by a court of equity against the maintenance of a nuisance which renders physically uncomfortable and substantially diminishes the ordinary use, occupation, and enjoyment of its property by its employees, agents, and officers, whose presence and occupancy of its premises is necessary to the conduct of its affairs and business.

Id. at 1090. In so finding, the Court cited the case of *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 27 L. Ed. 739, 2 S. Ct. 719 (1883)*, which held:

> "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie."

Gus Blass, 143 S.W. at 1090-91; *see also Eylar, 61 P.2d at 651* (citing *Fifth Baptist Church*) ("The plaintiff [Fifth **[**105]** Baptist Church] was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated."). Neither Arkansas nor Oklahoma law therefore restricts recovery of these damages to natural persons.

It may well be that plaintiffs are seeking relief for injuries for which it makes no sense to attribute to a corporation. The Court lacks sufficient information as to the basis of plaintiffs' "annoyance" and/or "inconvenience" to determine whether damages for either are logically limited to natural persons. The Court, however, finds no legal limitation under the authorities cited by Poultry Defendants, and therefore, declines to hold such damages are not recoverable as a matter of law. Accordingly, the Court denies Poultry Defendants' motion regarding damages for annoyance and inconvenience. (Dkt. # 211)

B. Decatur's Municipal Immunity Defense

Section 21-9-301 of the Arkansas Code, entitled "Tort liability -- Immunity declared" provides:

> It is declared to be the public policy of the State of Arkansas that all counties, *municipal* **[**106]** *corporations*, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies *shall be immune from liability and from suit for damages* except to the extent that they may be covered by **[*1304]** liability insurance.
>
> *No tort action shall lie against any such political subdivision because of the acts of its agents and employees.*

Ark. Code Ann. § 21-9-301(2002) (emphasis added). *Section 21-9-301*, however, "does not provide immunity for the intentional acts of [municipal corporations] and their employees, only their negligent acts." *Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760, 762 (Ark. 1992)*; *Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 (Ark. 1989).*

In its September 11, 2002 Order, the Court denied Decatur's motion to dismiss plaintiffs' claims of nuisance and trespass under Arkansas common law because plaintiffs alleged intentional torts of nuisance and trespass which were not subject to immunity under *Ark. Code. Ann. § 21-9-301*. n31 In its motion for summary judgment, Decatur continues to urge that it is entitled **[**107]** to immunity from plaintiffs' nuisance and trespass claims based on the following: (1) the Arkansas Supreme Court has found municipalities immune from trespass claims in *Chestnut v. Norwood, ("Chestnut") 292 Ark. 498, 731 S.W.2d 200, 201 (Ark. 1987)* under *§ 21-9-301*, and in *Chamberlain v. Newton County, ("Chamberlain")266 Ark. 516, 587 S.W.2d 4, 6 (Ark. 1979)* under *§ 21-9-301*'s predecessor statute; and (2) the only nuisance claims excepted from statutory immunity are those which constitute a taking by the municipality. *See Cabbiness v. City of North Little Rock, 228 Ark. 356, 307 S.W.2d 529,* *531 (Ark. 1957)*; *Robinson v. City of Ashdown, 301 Ark. 226, 783 S.W.2d 53 (Ark. 1990)*; *Thompson v. City of Siloam Springs, 333 Ark. 351, 969 S.W.2d 639, 642 (Ark. 1998)*; , *Sewer Improvement Dist. No. 1 of Sheridan v. Jones I ("Sheridan")199 Ark. 534, 134 S.W.2d 551, 552-53 (Ark. 1939)*; *Jones v. Sewer Improvement Dist. No. 3 of the City of Rogers ("Rogers"), 119 Ark. 166, 177 S.W. 888, 889-91 (Ark. 1915).*

> n31 The Court also noted that plaintiffs' claims for unjust enrichment and injunctive relief were not barred by the immunity statute.

[108]**

In *Chamberlain*, plaintiff sued Newton County in Chancery Court alleging that she was owner of land over which the county had constructed a roadway without her consent or grant. Plaintiff sought an injunction and damages for destruction to her property and costs of a survey. Newton County filed a third party complaint against the James, owners of property adjacent to plaintiff's land, alleging that it relied on the misrepresentation of the James that they were owners of the subject property and seeking reopening of another road and restoration of plaintiff's land. The chancery court entered a temporary order authorizing the county to open the old road, reciting the agreement of the county to place barricades at each end of the new road. Plaintiff then amended her complaint, joining the James and alleging that the county was "maintaining a nuisance" by failing to restore her land, and sought damages from the county and the James. The chancery court found that the county was immune from tort liability and dismissed plaintiff's complaint.

Plaintiff appealed, contending that the chancery court erred in determining that the plaintiff's amended complaint was a tort action as plaintiff **[**109]** had alleged a taking of her property. In affirming the chancery court's decision, the Arkansas Supreme Court held:

> If [plaintiff's] action be taken as a suit for damages for trespass, the chancery court had no jurisdiction. An action for trespass is in tort. . . . The chancery court had no jurisdiction of such an action for two reasons. Equity will not take jurisdiction of an action to recover **[*1305]** unliquidated damages for tort. . . . The county is immune from suit for damages in a tort action. [citing Ark. Stat. Ann. § 12-2901 (Supp. 1977), the predecessor statute to *§ 21-9-301*]. n32

Chamberlain, 587 S.W.2d at 6 (other citations omitted). The Court found the chancery court had no jurisdiction because

> [plaintiff's] only remedy against Newton County was to file a

> claim in the County Court of Newton County for just compensation for a completed taking. Exclusive jurisdiction of [plaintiff's] claim for compensation is vested in the County Court of Newton County as a matter relating to county roads. Art.7, § 28, Constitution of Arkansas. n33 The county could not be sued to recover this compensation by inverse condemnation proceedings. [citing **[**110]** Ark. Stat. Ann. § 17-702 (1968)].

Id. at 7.

n32 The former statute, Ark. Stat. Ann. § 12-2901 (Supp. 1977), the predecessor statute to *§ 21-9-301*, stated:

> It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.

n33 The Arkansas constitution grants "exclusive original jurisdiction" to county courts for "all matters relating to . . . roads . . . and every other case that may be necessary to the internal improvement and local concerns of the respective counties." Art. 7 § 28, Arkansas Constitution.

In *Chestnut*, the Arkansas Supreme Court upheld the constitutionality of the former municipal immunity statute, Ark. Stat. Ann. § 12-2901 (1979), and the **[**111]** dismissal of plaintiffs' claim "in tort for negligence" against a county judge and road foreman for monetary "damages allegedly caused by diverting surface waters onto the appellants' lands" based on governmental immunity and lack of jurisdiction. n34 In so doing, the Court cited its earlier opinion in *Chamberlain*:

> We affirmed a lower court dismissal of a suit for damages for trespass by Newton County in allegedly causing a road to be constructed on lands belonging to Chamberlain. We pointed out that trespass was a tort and that the trial court had no jurisdiction.

731 S.W.2d at 201.

n34 The Court specifically noted that it was not "denying recourse to [plaintiffs] for their damage, only the right to proceed in tort." *Id. at 202*

Neither of these decisions supports Decatur's immunity from the trespass claim alleged herein. Contrary to the facts in *Chestnut* and *Chamberlain*, plaintiffs are alleging an intent to "invade," "intrude upon," and "interfere with" the **[**112]** Water Supply, not a mistaken belief or negligence on the part of Decatur. Specifically, plaintiffs are alleging that Decatur intentionally continued its effluent discharge of phosphorus after it knew that the Water Supply would be harmed.

Similarly, the Court does not find an intentional nuisance claim is barred by the Arkansas municipal immunity statute. In *Robinson v. City of Ashdown, 301 Ark. 226, 783 S.W.2d 53, 56 (Ark. 1990)*, plaintiffs sued the city for negligence, nuisance and inverse condemnation for the repeated flooding of their house with raw sewage due to sewer back-up which continued over a nine-year period. The lower court directed a verdict against plaintiffs based on the city's immunity under *§ 21-9-301*.

The question before the Arkansas Supreme Court was "whether instances of negligence, with respect to which the city **[*1306]** has immunity from suit, may, if sustained a long time, amount to inverse condemnation." *783 S.W.2d at 54*. The Court held that "although injury to property through negligence or trespass does not, without more, qualify as a taking," n35 this case involved a "continuing trespass or nuisance [which] ripened into inverse condemnation." **[**113]** *Id. at 55*. Noting that "courts have used both nuisance and trespass theories to overcome the general rule that negligence does not result in inverse condemnation," *id. at 55*, the Court found the continued negligent acts of the city amounted to a taking because "when one knows that an invasion of another's interest in the use and enjoyment of land is substantially certain to result from one's conduct, the invasion is intentional." *Id. at 56*.

n35 The Court discussed the difference between inverse condemnation and eminent domain:

> As originally conceived and developed, the concept of inverse condemnation was a remedy for physical taking of private property without following eminent domain procedures. "Fault" has nothing to do with eminent domain, and it is *not bare trespass or negligence* which results in inverse condemnation but something which amounts to a de facto or common law "taking." . . . Inverse condemnation is thus a

> cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures.

Id. at 53 (emphasis added).

[114]**

The Court, however, did not rely on *§ 21-9-301* in finding the city was not immune from suit in this instance. Rather, it relied on Ark. Const. Art. 2, § 22 n36 in concluding

> When a municipality acts in a manner which substantially diminishes the value of a landowner's land, and its actions are shown to be intentional, it cannot escape its constitutional obligation to compensate for a taking of property on the basis of its immunity from tort action.

Id. at 56-57.

n36 Section 22 provides:

> The right of property is before and higher than any constitutional sanction and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

The dissent took issue with the majority's holding as to the city's immunity from negligent acts under *§ 21-9-301*:

> This statute is unequivocal in its prohibition against *any* action sounding in negligence, whether based upon trespass or any other tort. Statutes granting immunity from tort **[**115]** liability to subdivisions of the state have been held constitutionally sound by this court. *Thompson v. Sanford, 281 Ark. 365, 663 S.W.2d 932 (1984)*.
>
> We are today holding that, solely as a result of a municipality's recurring acts of *negligent trespass, without a showing of any intent*, offended parties may elect to consider their property "taken" by the political subdivision. I do not agree that this holding is within the meaning or the spirit of the Arkansas Constitution, the acts of the General Assembly, or our prior decisions.

Id. at 57 (emphasis added). In so stating, the dissent distinguished the authority relied upon by the majority, *McLaughlin v. City of Hope, 107 Ark. 442, 155 S.W.910 (1913)*:

> The major distinction between *McLaughlin* and the present case relates to scienter. In *McLaughlin*, there was no negligence involved--the waste was discharged into the stream by the city *with knowledge, and the act was intentional*. Here, recurring acts of negligence were shown in the city's failure to adequately maintain a lift pump **[*1307]** to transport sewage away from the appellants' property. The appellants' proper remedy **[**116]** would have been an action to seek abatement of the nuisance instead of one for damages.

Robinson, 783 S.W.2d at 57 (emphasis added).

In *Thompson v. City of Siloam Springs, 333 Ark. 351, 969 S.W.2d 639 (Ark. 1998)*, plaintiffs brought suit against a municipality for claims for inverse condemnation, negligence, intentional acts and omissions, and violation of their federal civil rights for failing to respond to a fire and intentionally pulling down a wall of their sale barn. The trial court granted the city's summary judgment motion, finding plaintiffs' negligence claims were barred by *§ 21-9-301* and plaintiffs had failed to show an intentional taking by the City.

On appeal, plaintiffs did not challenge the trial court's ruling that their negligence claim was barred by *§ 21-9-301*; rather, they contended there was a fact question as to whether the city's acts were intentional and amounting to a taking. In affirming the trial court's ruling, the Arkansas Supreme Court distinguished the facts in the case from those in *Robinson and National By-Products, Inc. v. City of Little Rock, 323 Ark. 619, 916 S.W.2d 745 (Ark. 1996)*, **[**117]** n37 in the lack of evidence of malice or intentional acts and failure to show substantial reduction in the value of their property. "While these facts would present a jury question on the issue of negligence, [plaintiffs] have not appealed the trial court's ruling that a claim of negligence is barred by *§ 21-9-301*." *323 Ark. at 624*.

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n37 *National By-Products, Inc. v. City of Little Rock, 323 Ark. 619, 916 S.W.2d 745 (Ark. 1996)*, did not involve the immunity statute. Rather, the Arkansas Supreme Court upheld the dismissal of an inverse condemnation claim. The Court interpreted Art. 2, § 22 of the Arkansas Constitution as requiring "compensation for a taking when a municipality acts in a manner which substantially diminishes the value of a landowner's land, and its actions are shown to be intentional." *916 S.W. 2d at 747*. The Court cited *Robinson*, saying that "a taking occurs when a condemnor acts in a manner which

> substantially diminishes the value of a landowner's land, and that a continuing trespass or nuisance could ripen into inverse condemnation." *Id.*

[118]**

In *Cabbiness v. City of North Little Rock, 228 Ark. 356, 307 S.W.2d 529 (Ark. 1957),* the question before the Arkansas Supreme Court on appeal was whether the City or the Boys' Club was liable for a nuisance claim based on injuries sustained by plaintiff in a pool which was leased by the City to the Boys' Club.

The Court first determined the allegations were negligence-based.

> Appellant lays great stress on the allegations in the complaint to the effect that the City had constructed and leased to the Boy's Club a *nuisance*, and that the Boys' Club had maintained such *nuisance*. Appellant claims that *maintaining a nuisance* is entirely different from an *act of negligence*. Of course, there is a distinction between nuisance and negligence. See 65 C.J.S. Negligence § § 1, p. 316; 66 C.J.S. Nuisances § § 6, p. 736; and 66 C.J.S. Nuisances § § 11, p. 751. But when we view the situation realistically in the case at bar, there are really questions of (a) whether the City was negligent in constructing the pool, and (b) whether the Boys' Club was negligent in failing to provide warnings as to the depth of the pool. Absent, as here, any eminent domain question **[**119]** of damage to property by the construction of a nuisance, the proper procedure for an aggrieved person is to sue to abate the nuisance, rather than to sue the municipality in tort. **[*1308]**

307 S.W. 2d 531 (emphasis added). The Court also held the city could not be held liable because it was acting in a governmental rather than proprietary capacity in owning the swimming pool. *Id. at 532-33.*

Sheridan and *Jones* simply stand for the following proposition: "neither municipal corporations nor local improvement districts nor their officers may be sued at law for tort; but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them." *Sheridan, 134 S.W.2d at 554*; *Jones, 177 S.W. at 891.*

The common law recognizes "a nuisance may be found from a continuous, known invasion, where after complaint and notice of damage, the land owner continues to offend and refuses to correct or discontinue the misuse." *Fletcher v. Independence, 708 S.W. 2d 158 at 166 (Mo. Ct. App. 1986).* Not one of the above cases refutes this common law theory that a nuisance can **[**120]** be an intentional tort. As the Court found in its earlier Orders, nuisance claims can be based on negligent or intentional conduct. It is the nature of the municipality's alleged conduct which determines whether immunity applies. Whether or not cast as inverse condemnation, *Robinson* supports that negligent acts can give rise to an intentional invasion after notice and complaint.

Arkansas law clearly excepts intentional torts from the municipal immunity statute. In *Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (Ark. 1992)*, plaintiffs brought claims of the tort of outrage, negligence, and liability under *42 U.S.C. § 1983* against the school district, its employees and the local school board members alleging defendants knew the elementary school contained friable asbestos and failed to correct the conditions and protect the children. The trial court dismissed the outrage and *§ 1983* claim for failure to state a claim and the negligence claim based on defendants' statutory immunity under *§ 21-9-301*. The Supreme Court affirmed the dismissal of the *§ 1983* and negligence claims and reversed the dismissal of the outrage claim.

The Court noted **[**121]** that plaintiffs alleged defendants were *aware* of the asbestos and the regulations requiring removal, and had *intentionally* violated the regulations, which violation rose to the level of outrage.

> By definition, the tort of outrage, also know as the intentional infliction of emotional distress . . . is an intentional tort. [Plaintiffs] are correct that *Section 21-9-301* does not provide immunity for the intentional acts of school districts and their employees, only their negligent acts.

833 S.W. 2d at 762 (citation omitted).

Similarly, in *Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 (Ark. 1989)*, the Arkansas Supreme Court reversed the lower court's dismissal of plaintiffs' suit for damages against the sheriff for the wrongful taking and sale of personal property seized on a writ of execution rejecting the sheriff's reliance on immunity from tort liability under *§ 21-9-301*. Taking the facts alleged in plaintiffs' complaint as true, the Court held that plaintiff stated a claim of intentional tort and therefore suit could not be dismissed based on municipal immunity.

> Although we have held that the public officials named under *§ 21-9-301* are **[**122]** immune from tort liability, *viz.*, negligent acts committed in the performance of their official duties, *Autry v. Lawrence, 286 Ark. 501, 696 S.W.2d 315 (1985)*, we have never interpreted that immunity to include intentional torts committed by those officials. We reject any suggestion to do so now. **[*1309]**

Id. at 433. See also *West Memphis School*

Dist. No. 4 of Crittenden County v. Circuit Court of Crittenden County, 316 Ark. 290, 871 S.W.2d 368 at 371 (Ark. 1994) (denying writ of prohibition to preclude court from asserting jurisdiction over county board members and finding lower court correctly recognized "the intentional actions by board members are not protected by statutory immunity."); *Waire v. Joseph, 308 Ark. 528, 825 S.W.2d 594 (Ark. 1992)* (*Section 21-9-301* does not provide immunity for intentional acts, only negligent acts.).

The Court notes that Decatur is not urging it is entitled to summary judgment based on immunity because plaintiffs have not met and cannot meet their evidentiary burden in proving intentional conduct. Rather, it is continuing to argue that plaintiffs cannot state a claim of trespass or nuisance **[**123]** based on intentional conduct under Arkansas law. The Court disagrees. Decatur's motion to find as a matter of law that plaintiff's cannot state intentional torts of trespass or nuisance is denied. (Dkt. # 240).

C. Common Law Claims against Peterson for its Pretreatment Discharge

Based on the allegations set forth in the First Amended Complaint, Peterson asserts it is entitled to judgment as a matter of law that neither its conduct nor activities associated with its discharge into Decatur's WWTP is actionable under federal or Arkansas law. Specifically, Peterson argues plaintiffs cannot hold it liable under CERCLA n38 or Arkansas common law for the following reasons: (1) it is not required under the CWA to obtain a NPDES permit to discharge into the WWTP; (2) its participation in and/or financial contribution to the design, engineering and construction of the WWTP is not a violation of federal or Arkansas law; (3) its knowledge of the WWTP's treatment process is irrelevant as Decatur's discharge into Columbia Hollow Creek is not in violation of its NPDES permit; and (4) the alleged impairment of the beneficial use of the lakes is not due to a violation of federal or Arkansas **[**124]** law by the "joint discharge" of Peterson and Decatur, as Decatur's NPDES permit does not impose any limits on the discharge of phosphorus.

> n38 As noted above, although plaintiffs and Peterson apparently assume plaintiffs have brought a CERCLA claim against Peterson for the effluent discharge from Decatur's WWTP, the Court finds no such claim in the First Amended Complaint.

The Court denies Peterson's motion for "judgment on the pleadings." What Peterson is in essence arguing is plaintiffs cannot bring common law claims against it for a joint effluent discharge of phosphorus from Decatur's WWTP because the NPDES permitting system under the CWA preempts any common law liability based on the discharge of phosphorus. Peterson is correct that there is no NPDES restriction on Decatur's WWTP's discharge of phosphorus. However, as the Court recognized in its

September 11, 2002 Order denying Decatur's motion to dismiss on similar grounds (and in its October 28, 2002 Order denying Decatur's motion to certify), **[**125]** "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state. . . . This authority may include the right to impose higher common-law as well as higher statutory restrictions." *International Paper Co. v. Ouellette, 479 U.S. 481, 497, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987).* The United States Supreme Court in *Ouellette* expressly recognized the source state's right to impose separate "standards" through its nuisance laws which "create some tension with the permit system." *Id. at 499*; *see also Stoddard v. Western Carolina Reg'l* **[*1310]** *Sewer Auth., 784 F.2d 1200 (4th Cir. 1986)* (CWA does not preempt state regulation and common law remedy awarded riparian landowners for taking of their property due to sewage discharge); *Union Oil Co. of California v. Heinsohn, 43 F.3d 500, 504 (10th Cir.1994)* ("Licensing is not in itself enough to avoid liability [for nuisance]."). Therefore, should plaintiffs prove Peterson and Decatur jointly and intentionally discharged levels of phosphorus which interfered with the use and enjoyment of the Water Supply, a "higher common **[**126]** law" standard would necessarily be imposed. Peterson's motion under Arkansas law is denied.

D. Unjust Enrichment

Decatur and Poultry Defendants move for partial summary judgment that they have received no benefit from any service performed or cost incurred by plaintiffs to establish an unjust enrichment claim under Oklahoma or Arkansas law. Defendants contend plaintiffs' expenditures with respect to the Water Supply have not added to any property owned by defendants or saved any expense defendants were obligated to incur; therefore, any action plaintiffs have taken to improve their own Water Supply benefits only plaintiffs.

Plaintiffs argue that defendants received the benefit of not incurring costs to haul their poultry litter out of the Watershed and to remove excess phosphorus from the Decatur WWTP, having instead passed on the expense to plaintiffs for the cleanup of the resulting contamination of the Water Supply. Plaintiffs estimate that during the time period from 1997-2002, they have benefitted Poultry Defendants in the amount of $ 16,893,312 for their failure to remove poultry litter from the Watershed and saved Decatur and Peterson $ 2,969,558 and $ 2,985,840, **[**127]** respectively, for water treatment costs.

Under Oklahoma and Arkansas law, plaintiff must show "enrichment to another coupled with a resulting injustice" to recover under a theory of unjust enrichment. *Teel v. Public Serv. Co. of Oklahoma, 1985 OK 112, 767 P.2d 391, 398 (Okla. 1985)*; *County Line Inv. Co. v. Tinney, 933 F.2d 1508 at 1518 (10th Cir. 1991)* (applying Oklahoma law); *Dews v. Halliburton Indus., Inc., 288 Ark. 532, 708 SW.2d 67, 69 (Ark. 1986)* ("To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore. There must also be some operative act, intent, or situation to make the enrichment unjust and compensable."); *Sparks Regional Medical Ctr. v. Blatt, 55 Ark. App. 311, 935 S.W.2d 304, 307 (Ark. Ct. App. 1997)* (same). To establish entitlement, plaintiff must at a minimum show "either an expenditure adding to the property of another or one that 'saves the other from expense or loss.'" *Tinney, 933 F.2d at 1518* (quoting *McBride v. Bridges, 1950 OK 25, 202 Okla. 508, 215 P.2d 830, 832 (Okla.1950)*); *Sparks, 935 S.W.2d at 307* **[**128]** ("The courts will imply a promise to pay for services only where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary.").

What plaintiffs are seeking in this case are damages and injunctive relief for injury to the Water Supply which allegedly resulted from defendants' practices. In other words, plaintiffs are seeking to prove that defendants have caused the contamination of the Water Supply in violation of the law and that plaintiffs are therefore entitled to recover damages for that injury and abate the practices which caused the injury. However, for plaintiffs to rely on the doctrine of unjust enrichment, an obligation which plaintiffs seek to prove would **[*1311]** have to be assumed: that is, defendants *should* have prevented the contamination of the Water Supply by incurring the expense of hauling the poultry litter out of the Watershed and treating the wastewater at Decatur's WWTP to reduce the level of phosphorus. The ill fit of this theory is particularly apparent in plaintiffs seeking recovery of costs they have not incurred. Plaintiffs have not hauled the poultry litter from **[**129]** the Watershed or treated Decatur's wastewater. Rather, plaintiffs have incurred costs from the treatment of the water from the lakes, which they now seek to recover in damages. Damages and/or injunctive relief is the appropriate remedy in this case, not restitution. Accordingly, the Court grants Decatur's and Poultry Defendants' motion for summary judgment on plaintiffs' unjust enrichment claims. (Dkt. # # 211 and 240).

E. Unclean Hands

Decatur contends plaintiffs are barred from injunctive relief by the equitable doctrine of unclean hands: "equity will not intervene on behalf of a plaintiff whose conduct in connection with the same matter has been unconscientious or unjust." *Merchants & Planters Bank & Trust Co. of Arkadelphia v. Massey, 302 Ark. 421, 790 S.W.2d 889, 891 (Ark. 1990)*. Decatur cites plaintiffs' discharge of wastewater from its treatment plants into the Arkansas River, from the Eucha Sewer Lagoons into Lake Eucha from 1972 through 1983, and the occasions from 1983 through 1991 in which plaintiffs siphoned or decanted sewage from the lagoons to the lake.

Plaintiffs assert the equitable doctrine of unclean hands does not apply, as the alleged **[**130]** misconduct of plaintiffs does not arise out of and is not related to the same subject matter of plaintiffs' claims against the defendants. *Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42 (10th Cir. 1966)* (Under Oklahoma law, "equity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable."). They assert that there is no relationship between plaintiffs' discharge into the Arkansas River watershed and Decatur's discharge into the Eucha/Spavinaw watershed, and that plaintiffs' operation of the wastewater treatment lagoons at Eucha State Park occurred 25 years ago. Further, plaintiffs contend Decatur's phosphorus loading to plaintiffs' water supply is estimated at 10 tons/year since the 1960s, whereas the estimated volume from the Eucha State Park lagoons is undetectable.

As the "maxim [of unclean hands] admits of the free exercise of judicial discretion in the furtherance of justice," *id. at 42*, and the relatedness of the parties' contribution of phosphorus to the Water Supply is in dispute, the Court denies the motion for summary judgment and reserves ruling until it hears **[**131]** all the evidence and addresses plaintiffs' claim for injunctive relief.

VI. CONCLUSION

In accordance with the above, **IT IS HEREBY ORDERED** that:

Dkt. # 211	Poultry Defendants Motion for Summary Judgment or in the Alternative for Partial Summary Judgment and Integrated Original Brief in Support is granted in part and denied in part;
Dkt. # 216	Separate Defendant Simmons Foods Inc.'s Motion for Summary Judgment is denied;
Dkt. # 219	[Peterson's] Motion for Summary Judgment is denied;
Dkt. # 225	Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure is granted in part and denied in part;
Dkt. # 226	Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability Under CERCLA is denied;
Dkt. # 229	Separate Defendant George's Inc.'s Motion for Summary Judgment is denied;

Dkt. # 232	Separate Defendant Tyson Foods, Inc.'s Motion and Integrated Brief in Support of Summary Judgment is denied;
Dkt. # 238	Motion of Separate Defendant Cargill Inc's and Brief in Support of Supplemental Motion for Partial Summary Judgment is denied;
Dkt. # 239	Separate Defendant Cobb-Vantress Inc.'s Motion and Integrated Brief in Support of Summary Judgment is denied;
Dkt. # 240	Defendant City of Decatur's Motion for Summary Judgment and Brief in Support is granted in part and denied in part; and
Dkt. # 255	Poultry Defendants'. . . Motion and Brief to Strike Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants is denied.

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[132] [*1312]**

IT IS SO ORDERED this 14th day of March, 2003.

CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE